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AN ESSAY
ON THE LEARNING OF
CONTINGENT REMAINDERS
AND
EXECUTORY DEVICES.

BY CHARLES FEARNE, Esq.
BARRISTER AT LAW, OF THE INNER TEMPLE.

FOURTH AMERICAN, FROM THE TENTH LONDON EDITION;

CONTAINING THE

Notes, Cases, and other Matter added to the former Editions

BY CHARLES BUTLER, Esq.
OF LINCOLN'S-INN, BARRISTER AT LAW.

WITH AN

ORIGINAL VIEW OF EXECUTORY INTERESTS
IN

Real and Personal Property,

COMPRISING

THE POINTS DEDUCIBLE FROM THE CASES STATED IN THE
TREATISE OF FEARNE,

AS WELL AS STATEMENTS OF, AND THE CONCLUSIONS FROM,
THREE HUNDRED ADDITIONAL MODERN CASES,
TOGETHER WITH REFERENCES TO NUMEROUS OTHER DECISIONS,

AND

SO CONNECTED WITH THE TEXT OF FEARNE, AS TO FORM
A BODY OF NOTES THERETO.

By JOSIAH W. SMITH, B. C. L.
OF LINCOLN'S-INN, BARRISTER AT LAW.

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P R E F A C E.*

IN submitting the following Essay to the indulgent consideration of the profession, it may be proper to make a few remarks, which may serve at once to explain its design, and to put the student on his guard against the mistakes into which, in the investigation of executory interests, he is liable to fall.

It may be safely affirmed, that there is no subject in the whole range of legal learning, so abstruse as the learning of executory interests, and yet, at the same time, none more practical and useful.

Notwithstanding the assistance afforded by so many volumes of ably drawn precedents, an accurate knowledge of this subject is highly requisite to all who are engaged in the practice of conveyancing. This is evident from the many hundreds of reported cases which have been brought before the courts, in consequence of ignorance or imperfect knowledge on the part of the individuals who have drawn the deeds or wills to which such cases have related. And to the Bar, whose duty it is to advise upon questions of property, as well as to discuss them in court, an accurate knowledge of this branch of learning is not only highly requisite, but indispensably and constantly necessary.

But, however requisite or necessary it always has been, how few could reasonably be expected to have attained it! We are told by one of the greatest Judges who ever lived, that such is the number and character of the decisions on the Rule in Shelley's case and its kindred topics alone, that "the mind is overpowered by their multitude, and the subtlety of the distinctions between them."† And yet these constitute but a part, and, in their own nature, by no means the most difficult part, of the subject of executory interests.

* See Preface to the present edition of Fearn, in the First Volume.

† 2 Bligh, 50.

In the cases falling within the scope of the following sheets, the same words are frequently used in different senses; sometimes in a generic sense, at other times in a specific sense; sometimes in the primary or original sense, at other times in a derivative or secondary sense. Generic terms are repeatedly used, where specific terms should have been employed; and sometimes a particular species of executory devises or uses is spoken of as if it included the whole body of executory limitations. Cases essentially dissimilar to each other are often improperly classed together; while, on the other hand, general principles have not been deduced, where it was possible, though difficult, to deduce them. Rules have been laid down, without the necessary qualifications. Dicta and opinions stand in real or apparent opposition to each other at every turn. Cases have been frequently decided upon the authority of others which in reality were not in point, or otherwise upon wrong grounds, even where they have been rightly decided. Some decisions are really at variance with others; while many more appear to be conflicting, when in reality they admit of reconciliation. And the frequent result of all this has been, that the student has scarcely ventured to attempt to gain an insight into such an intricate subject, or has risen from a consideration of it with a notion that he had mastered its difficulties, when in truth his head has only been filled with vague, confused, and erroneous conceptions. Practitioners, and sometimes even judicial minds, have been the victims of the most painful perplexity, and have been led into the most serious mistakes: and points which would or might otherwise have been set at rest for ever, have been litigated again and again. In short, *a general and most baneful ignorance has prevailed, which the vagueness and endless discrepancies of the books, have rendered inevitable to most persons, and excusable in all.*

The absence of accurate divisions and definitions of the various kinds of interests, conditions, and limitations, has been at once the necessary consequence, and the most prolific source of the ignorance and misapprehension that have so generally prevailed. It has been the necessary consequence of that ignorance and misapprehension; because, it is impossible accurately to divide and define, without a clear, correct, and complete view of the whole subject. And it has been the most prolific source of that ignorance and misapprehension; because, accurate divisions and definitions are as essential for the assistance of the student and the practitioner, in this abstruse and intricate subject, as

are the definitions of the several parts of speech, and the arrangement of nouns into declensions, and verbs into moods and tenses, in a Greek grammar, for the assistance of the student in classics: and the state of perplexity and confusion which has been so common, in regard to executory interests, has been as unavoidable as that which the student in classics would experience, if he were to plunge at once into the most difficult authors, without the guidance of a grammar.

The author has not specifically pointed out the passages which might be adduced in illustration of the foregoing remarks. To have done so, would have swelled out the work to a very great bulk, and have given the whole of it a censorious complexion, utterly repugnant to his feelings. In some few cases, it has been absolutely necessary to point out particular instances of mistake or inadvertence on the part of the profound Author, and the very eminent Editor of the former editions, of the admirable Treatise to which these pages are subjoined. But, generally speaking, he has avoided so disagreeable a task; and he has carefully abstained from specifically noticing any misapprehension or oversight in living authors, lest, possibly, he might be inflicting an injury, where it would be more consonant to his inclinations to speak in terms of eulogy, or, if he were able, to lend a helping hand.

Under these circumstances, the *design* of the following Essay has been, to divide or analytically arrange the various kinds of interests, conditions, and limitations, in such a way as to exhibit their intricate variety at one perspicuous view;—to frame correct definitions of them, so as generally, yet clearly, to distinguish them from each other, preparatory to an examination of those special cases in which some interests must be particularly distinguished from others that are apparently identical in their nature;—specifically to distinguish between these interests, and to add such other distinctions upon miscellaneous points, as might seem to be required, by means of precise rules and propositions, supported and illustrated by abstracts of cases;—to point out the grounds and reasons of the several distinctions;—and to deduce general principles from “a crude discordant mass” of decisions, “long permitted to accumulate in silent and indescribable confusion;”^{*}—and thus to *give an accurate, well-defined, and perspicuous view of executory interests, reconciling and harmonizing, to the utmost possible extent, apparently clash-*

^{*} Hayes on Limitations, Introd. p. 18.

ing cases, jarring dicta, and discordant passages, and commending itself to reason and the analogy of law.

Such is the *attempt* made in the following pages. How far it is successful, it remains for others to decide.

Some of the definitions are rather of the length of descriptions. But what, it may be asked, is the use of definitions which are so short, that they convey no clear notions except to him who is well acquainted with the nature of the things defined, before he reads the definitions thereof?

The Reader will observe numerous references to cases as stated by Fearne, and to some as stated by Roper. The author thought it expedient to contract, in some degree, the field of his labour, lest he might be compelled or tempted to take only a cursory or superficial view of his subject; and, for this reason, he has only given abstracts or statements of cases decided within the last fifty years, except in one or two instances; and has almost always relied upon the abstracts or statements of the earlier decisions by Fearne and Roper, and in one or two instances, by some other writer. But he has not implicitly adopted or relied upon the rules or propositions which they have deduced from the cases, but has made or added such qualifications or modifications of those rules or propositions, or deduced such fresh conclusions from the earlier cases, as seemed to be requisite, upon a careful consideration of their abstracts of those cases, and of the later cases abstracted by himself. To have given statements of the cases correctly stated in Fearne, would of course have been superfluous; and as those earlier cases which relate to chattels personal and are not in Fearne, are very fully stated in Roper's *Legacies*, a work which is in the hands of most members of the profession, it seemed sufficient merely to refer to those cases, as stated in Roper, in support of the rules and propositions laid down in regard to such chattels personal.

The references to Fearne are to the pages of the third edition, printed in the margin of the present edition, within brackets, as in the ninth and other intermediate editions.

The abstracts or statements of many of the cases may at first sight seem unnecessarily lengthy: but the author has only given (as compendiously as he could, consistently with adhering to the words of the Judges,) what he considers a sufficiently full abstract of the several cases, and the grounds of the several decisions, with the view of saving the practitioner, as much as possible, the necessity of referring to the Reports themselves,

by enabling him to discern, at once, whether the case before him is governed by previous cases, or may be distinguished from them. To enable him to do this, it was necessary to specify the grounds on which these cases were decided, as well as to state the cases themselves: for, it frequently happens, that one case may closely resemble another in terms, but yet may not be affected by it; inasmuch as the principle of the one is not at all applicable to the other, or the one may have been decided upon grounds peculiar to itself, and not constituting any general principle of law. And in taking this course, the author has only been following the example of Fearné himself.

The Student will find the distinctions, points, and principles, embodied in rules or propositions, or in distinct passages, instead of being obliged to search for them in the discussion of cases; so that he can either read the cases, as illustrations of the rules or propositions, or can pass over them entirely, and possess himself, with comparative facility, of the result of the author's labours.

With reference to the title, "An Original View," the author is particularly desirous of observing, that the work was not commenced or carried on with the endeavour or the wish to broach novel opinions. Though he believes, that as a whole, it is as original as any law book, supported by authorities, can be; yet, *originality was not his object; and so far from being partial to his own first impressions, or from affecting novelty, he has all along considered that there is a most vehement presumption in favour of the actual decisions of the Judges, as distinguished from their extra-judicial dicta; because they have had the immense advantage of hearing both sides of the argument ably discussed; and, therefore, he has always striven to reconcile their decisions with each other, and with principle; and in the very few instances in which he has ventured to question the soundness of a decision, he has done so with extreme reluctance. And with respect to the text books, he has gladly availed himself of the authority of such standard words as Coke upon Littleton, Sheppard's Touchstone, Blackstone's Commentaries, and the Treatise of Fearné, even where the support afforded by them is but indirect or partial.*

Where the points have been deduced or collected, rather than copied from, or in terms furnished in, the works of these and other writers, or in the reports of cases, the author has prefixed the word "see" to the reference. And the letters which refer to the authorities at the bottom of the page, are

printed both at the beginning and ending of the points supported by such authorities. This plan was adopted out of caution, in order that in considering any particular point, the reader might see more clearly the authority upon which it rests.

Having explained the nature of the present *attempt*, the author may be permitted to add, that while it has afforded him the highest intellectual gratification, it has at the same time occasioned him the most intense and distracting thought, inasmuch, that in several instances, he must have fallen a victim to it, had he not been preserved and supported by the gracious care of Him "in whose hand it is to give strength unto all." Yet, notwithstanding all the labour he has bestowed, it would perhaps be presumptuous in him to suppose, that he has not fallen into any misconceptions, or that he is not chargeable with any inadvertencies. Indeed, it is with feelings of the most unfeigned diffidence, that he ventures to submit these pages to the judgment of the profession. He does so in the humble hope, that, bearing in mind the fallibility of those who criticise, as well as of those whose writings are the subjects of criticism, and the liability, indeed, even of the most acute and profound to fall into error, where the distinctions are necessarily so subtle, and the relations so complex; and remembering also, that error is often more plausible than truth; the Reader will hesitate before he condemns or censures what has been the result of such close consideration; and, that if he should consider any part of the Essay to be erroneous or faulty, after well weighing the same, he will not be unwilling to make those allowances which the unusual difficulty of the work would seem to entitle the author to claim at his hands.

AN ANALYSIS

OF THE FOLLOWING

ESSAY ON EXECUTORY INTERESTS.

PART I.

THE VARIOUS KINDS OF INTERESTS, AND THE DIFFERENT SORTS OF CONDITIONS AND LIMITATIONS ON WHICH THEY DEPEND, OR BY WHICH THEY ARE CREATED OR AFFECTED, ANALYTICALLY ARRANGED, DEFINED, AND DISTINGUISHED.

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 248—50. I. Where a freehold after a term is a present vested interest, subject to a term;
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 253. Freeholds after a term are called remainders by Fearn, in some sense; and assumed to be such in several cases, in some sense at least. But this assumption was extrajudicial. And if Fearn assumes them to be remainders, properly so called, this would appear to be an oversight.
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- 285—6. I. Where the conditional words are, when, as soon as, at, upon, from and after.
- 287—9. The doctrine of the Civil Law.
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291. 1. In the case of legacies,
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 313. *Grant v. Grant*, 3 Y. & C. 171. *Blease v. Burgh*, 2 Beav. 221.
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 318. Quotation from Voët.
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 321—2. 3. Non-application of the distinction to charges on real estate.
 323. Non-application of the distinction to charges on real estate, is no reflection against its soundness.
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 324. (1) Non-existence of the money before the future period.
 325. (2) Favour shown to the heir.
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 327. 4. Application of the distinction to the case of legacies charged on a mixed fund.
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 331. *Batsford v. Kebbell*, 3 Ves. Jun. 363. *Edwards v. Symons*, 6 Taunt. 213. *Hanson v. Graham*, 6 Ves. 239. *Lane v. Goudge*, 9 Ves. 225. *Doe d. Dolley v. Ward*, 9 Ad. & El. 582. *Rolfe v. Sowerby*, 1 Taml. 376. *Breedon v. Tugman*, 3 M. & K. 289. *Watson v. Hayes*, 9 Sim. 500. *Lister v. Bradley*, 1 Hare, 10.
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 332. 1. Giving of interest shows intention to separate the legacy from the residue.
 333—5. 2. Intermediate income is given in respect of a vested interest in the property itself.
 336—7. 3. But this construction of a gift of intermediate income not being one that arises from necessary implication, such gift is not sufficient to vest an interest, apart from the leaning in favour of vesting;
 338. And as the leaning in favour of vesting is counterpoised by other considerations in the case of charges on real estate, the gift of the intermediate income is insufficient to vest such charges.

339. But if a legacy charged on real estate is expressly directed to vest before the day for payment, it will so vest.
Watkins v. Cheek, 2 Sim. & Stu. 199.
340. III. Where executors are empowered to make advances out of portions.
Vivian v. Mills, 1 Beav. 315.
- 340a. IV. Where the postponement is apparently from necessity, or for the accomplishment of some special purpose in the meantime, unconnected with a suspension of the property or ownership.
Bacon v. Proctor, Turn. & Russ. 31. *Goodright d. Revell v. Parker*, 1 Mau. & Sel. 962. *Bayley v. Bishop*, 9 Ves. 6. *Blamire v. Geldart*, 16 Ves. 314. *Goulbourn v. Brooks*, 2 You. & Coll. 539. *Cousins v. Schroder*, 4 Sim. 23. *Poole v. Terry*, Sim. 294. *Spencer v. Bullock*, 2 Ves. 687, and observations thereon.
341. V. Cases of residuary bequests on marriage.
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- 342—3. VI. Cases of particular bequests or devises where the period is an uncertain one other than that of the attainment of a given age.
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345. VIII. Where a trustee is appointed for the intermediate time.
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- 346—50. Rule and illustrations.
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Spring v. Caesar, Roll. Abr., 415, pl. 12. *Edwards v. Hammond*, 1 New Rep. 313. *Broomfield v. Crowder*, 1 New Rep. 313. *Doe d. Planner v. Scudamore*, 2 Bos. & Pul. 289.
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- 353—4. The reason why the interest of the prior devise, in cases falling within the above rule, is a vested interest.
355. Cases where the prior devise was held to take a vested interest on account of the devise over.
Doe d. Hunt v. Moore, 14 East, 601. *Doe d. Roake v. Nowell*, 1 Mau. & Sel. 327. *Randall v. Doe d. Roake*, 5 Dow. 202.
356. But these cases are not to be relied on.
357. The interest of the prior devisee must have been held contingent, if there had been no devise over; and the devise over could not render it vested.
358. II. Effect of a devise over simply on the non-happening of the event on which the prior devise is apparently made contingent.
359. 1. Such a devise over does not afford a necessary presumption that the prior devise is contingent.
360. 2. But still it affords some presumption thereof.
361. Or, at all events, it affords no ground for supposing such prior devise to be vested.
362. *Skey v. Barnes*, 3 Meriv. 335. *Judd v. Judd*, 3 Sim. 525. *Hunter v. Judd*, 4 Sim. 455.
- 362a. III. Devise over to survivors of a class affords some presumption of vesting.
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363. IV. Where a prior devise is apparently made contingent on the attainment of a certain age, and there is a devise over in case of death under that age without issue, after an intermediate devise to the issue.
- 364—5. V. Where a similar prior devise is made, with a similar devise over, but there is no intermediate devise to the issue.
Bland v. Williams, 3 M. & K. 411. *Machin v. Reynolds*, 3 Brod. & Bing. 122. *Farmer v. Francis*, 2 Bing. 151, and 2 Sim. & Stu. 505. *Murkin v. Phillipson*, 3 M. & K. 259. *Phipps v. Williams*, 5 Sim. 44. *Phipps v. Achers*, 3 Clark & Fin. 702. *Warter v. Warter*, 2 Brod. & Bing. 349.
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- 366a. Rule,
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371. 1. Where no valid appointment is made, or only a partial appointment.
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373. II. Where the power authorises a selection, and there is a limitation in default of appointment.
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375. I. Where a limitation is to take effect after the death of a person who has a life estate under a previous instrument, and such limitation is a limitation of the whole or the immediate part of the reversion, instead of a contingent remainder of the third class.
376. II. or instead of a limitation of a springing interest.
377. Observation grounded on the foregoing distinctions.
378. III. Where a limitation is to take effect on an indefinite failure of issue who are all inheritable under estates tail created by a previous instrument; and such limitation is a limitation of the whole or the immediate part of the reversion.

379. IV. Where a limitation is to take effect on an indefinite failure of issue, some of whom are not inheritable under such estates tail; and such limitation is a limitation of a springing interest.
380. Exception, where the interval may be filled up by implication.
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- Banks v. Holme*, 1 Russ. 394.
381. V. Where a limitation is made of the reversion, *eo nomine*, on an indefinite failure of issue, some of whom are not inheritable under such estates tail; and such limitation is a limitation of the whole or the immediate part of the reversion.
- Egerton v. Jones*, 3 Sim. 409.
382. VI. Where a limitation is to take effect on an indefinite failure of issue, without restriction to issue by a particular marriage, who are alone inheritable under previously created estates tail; but yet no other marriage was contemplated, and therefore such limitation is a limitation of the whole or the immediate part of the reversion.

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OF LIMITATIONS TO THE HEIR OR HEIRS OF A LIVING PERSON, CONSIDERED IN RELATION TO THE FOURTH CLASS OF CONTINGENT REMAINDERS.

AND, FIRST, OF SUCH LIMITATIONS WHEN THEY PRIMA FACIE FALL WITHIN THE DESCRIPTION OF THAT CLASS, BUT IN REALITY DO NOT COME WITHIN IT; THE WORD HEIR MEANING HEIR APPARENT OR PRESUMPTIVE, AND THE WORD HEIRS MEANING SONS, DAUGHTERS, OR CHILDREN.

383. Strict sense of the word heir.
- A remainder to the heirs of a living person is a limitation to a person not in being.
384. or if in being, not yet ascertained.
385. And hence such remainder is a contingent remainder of the fourth class. But,
386. I. Sometimes it does not fall within the description of that class.
387. 1. Where the word heirs is used for sons, daughters, or children.
- Doct d. Hallen v. Ironmonger*, 3 East, 583.
388. Where the word heir is used for heir apparent or presumptive.
389. H. In some other cases, the remainder does fall within the description of, but yet constitutes an exception from the fourth class of contingent remainders.

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393. *Shelley's Case*.
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 400—1. Another statement of the Rule.
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- 411—12. IV. In possession, to some purposes only.
- 413—17. Cases to be distinguished.
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- 419. I. Prevention of fraud upon feudal tenure.
- 420. II. Prevention of fraud upon the specialty creditors of the ancestor.
- 421. III. Desire of facilitating alienation.
- 422. IV. These reasons involve another;
- 423. namely, that the two limitations would generally and in the main have virtually accomplished the same purpose as a gift of the inheritance to the ancestor.
- 424. Illustration of this.
- 425. Certain objections answered.
- 426—27. Answer to another objection drawn from the case of fictitious descents *per formam doni*.
- 428. Fearne's answer to the objection that the Rule frustrates the testator's intention.
- 429. V. The object of the Rule is to give effect to the primary or paramount intent at the expense of the secondary or minor intent.
- 430. Definition of the primary or paramount intent.
- 431. Definition of the secondary or minor intent.
- 432. The primary or paramount intent is imported by the word heirs, in connexion with the preceding freehold.
- 433. Necessary to reject the secondary or minor intent in order to effectuate the primary or paramount intent;
- 434. both in the case of limitations to heirs general,
- 435. and in the case of limitations to heirs special.
- 435a. Answer to an objection drawn from the case of a fictitious descent *per formam doni*.
- 436. It is accurate and definite to say that the secondary or minor intent is sacrificed to effectuate the primary or paramount intent.
- 437. Observations of Lord Redesdale.
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- 439. They are just, but are not explanatory of the grounds of the Rule.
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- 443. Wherein consists the incorrectness and vagueness of the common statement of the Rule.
- 444. Observation of Lord Eldon on the general and particular intent.
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- 446. The Rule is not a medium for discovering the intention.
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- 450. Summary of the grounds of the Rule.

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- 452. Three general rules or propositions may be laid down.
- 453. I. First general proposition, showing where the rule *applies*, notwithstanding apparent indications to the contrary.
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- 456. 3. Power to jointure, or make leases.
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- 461. 8. Concurrence of several of these indications.
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- 462. 9. Freehold determinable in ancestor's lifetime.
- 463. 10. Freehold by implication.
- 464—5. 11. Freehold by resulting use, where a remainder is limited to the heirs special of the grantor, even where there is an ulterior vested interest.
- 465a. Cases where the limitation is to the heirs special of a third person.
- 466. 12. Freehold by resulting use, where a springing interest is limited to the heirs special of the grantor.
- 467. 13. Where there are apparently two concurrent contingent remainders.
Doe d. Cole v. Goldsmith, 7 Taunt. 209.
- 468. 14. Where the ancestor's estate is not for his own benefit.
- 469. 15. Where both estates are equitable, even though the first be for the separate use of a feme covert.
- 470. 16. Where the estate is copyhold.
- 471. 17. Where a limitation to right heirs male follows one to first and other sons.
Doe d. Earl of Lindsey v. Colyear, 11 East, 548.
- 471a. 18. Tenant in tail after possibility of issue extinct.
Platt v. Powles, 2 Mau. & Sel. 65.
- 471b. II. Second general proposition, showing where the rule *applies*, notwithstanding apparent indications to the contrary.
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473. 1. Word heir, in the singular, with the word first, next, or eldest; but without superadded words of limitation.
474. 2. Words of limitation superadded to the word heirs.
Kinch v. Ward, 2 Sim. & Stu. 409. *Measure v. Gee*, 5 Bar. & Ald. 910. *Nash v. Coates*, 3 Bar. & Adol. 839.
475. 3. Superadded words of distributive modification, without superadded words of limitation.
Doe d. Candler v. Smith, 7 D. & E. 531. *Bennett v. Earl of Tankerville*, 19 Ves. 170. *Pierson v. Vickers*, 5 East, 548. *Jesson v. Wright*, 2 Bligh. 51. *Doe d. Atkinson v. Featherstone*, 1 Bar. & Adol. 944. *Gretton v. Howard*, 6 Taunt. 94, and observations thereon.
476. 4. Word sons or daughters, referring to the heirs, if only used in the sense of males or females, &c.
Poole v. Poole, 3 Bos. & Pul. 620.
477. 5. Intention that the limitations should be in strict settlement.
Douglas v. Congreve, 1 Beav. 59.
478. 6. Superadded words usually occurring in limitations to first and other sons in tail.
Fetherston v. Fetherston, 3 Clark & Fin. 67. S. C. 9 Bligh, 237.
479. III. Third general proposition, showing where the rule does not apply.
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481. 1. Direct explanation or indication that the persons who are to succeed are not persons who are to take simply as heirs general or special.
Lowe v. Davies, 2 Ld. Raym. 1561.
482. *Goodtitle d. Sweet v. Herring*, 1 East, 164. *North v. Martin*, 6 Sim. 266.
484. 2. Indirect explanation or indication.
485. (1) Word heir, with superadded words of limitation.
486. (2) Limitation to the heir for life.
487. (3) Superadded words of limitation which limit the estate to persons of a different sex.
488. (4) Words of distributive modification, with superadded words of limitation.
- 488a. (5) Words of distributive modification, with a limitation over in the case of the death of such issue under a certain age.
Doe d. Strong v. Goff, 11 East, 668, and observations thereon. *Crump v. Norwood*, 7 Taunt. 362.
- 488b. (6) Blending a limitation to the heirs special of another person, and superadding words of limitation.

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- 489. Definition of an executory trust.
- 490. I. Rule as to executory trusts created by will.
- 491. Ground of distinction between trusts executed and trusts executory.
- 492—93. Illustrations of the foregoing rule.
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- 495. Distinction between trusts executed and trusts executory is more strongly marked in the case of those created by marriage settlement.
- 496—99. Illustrations of the second of the foregoing rules.
- 500. 1. Cases constituting the first exception to the second of the foregoing rules.
- 501. 2. Cases constituting the second exception.
- 502. 3. The third exception.

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THIRD EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT RE-MAINDERS, WHERE REAL ESTATE IS DEVISED TO A PERSON AND TO HIS ISSUE; AND THE WORD ISSUE IS CONSTRUED TO BE A WORD OF LIMITATION, BY ANALOGY TO THE RULE IN SHELLEY'S CASE, AND UNDER THE CY PRES DOCTRINE.

- 503. Difficulty of construing devises to or for a person and his issue, express or implied.
- 504. I. Where the word issue is a word of limitation, in the case of direct devises and trusts executed.
- 505. II. Where the word issue is a word of purchase, in the case of direct devises and trusts executed.
- 506. Rule embracing both the preceding rules.
- 507. Different senses of the word issue.
- 508. "Issue" is a word either of purchase or of limitation in a will; but always a word of purchase in a deed.
- 509. Why it is a word of purchase in a deed.
- 510—12. It is ill adapted for a word of purchase.
- 513. But it is well adapted for a word of limitation.
- 514. And this is one of the grounds of the foregoing rules.
- 515. How the testator may manifest an intention that the word issue should not be a word of limitation.

516. It is not manifested by superadding kindred words of limitation, or giving the ancestor an estate expressly for life, or without impeachment of waste.
517. Nor by introducing words of contingency which would have been implied.
518. Nor by prohibiting the ancestor from committing waste.
519. These indications are equivocal.
520. Another ground of the foregoing rules; namely, two co-existing yet inconsistent intents, the one of which must be sacrificed to the other.
521. Definition of the primary or paramount intent.
522. Definition of the secondary or minor intent.
- 523—24. By what the primary or paramount intent is imported or evidenced.
- 525—26. Observations showing the expediency and propriety of construing the word issue as a word of limitation, in order to effectuate the primary or paramount intent, in cases falling within the first rule.
527. Observations showing the propriety of construing the word issue a word of purchase, in cases falling within the second rule.
528. There is less presumption against construing issue a word of purchase, than there is against construing heirs a word of purchase, and especially heirs generally.
529. Illustrations of the first rule—
Lyon v. Michel, 1 Mad. 473. *Tate v. Clark*, 1 Beav. 100, and observations thereon.
530. Illustrations of the second rule—
Hockley v. Mawbey, 1 Ves. 142. *Doe d. Davy v. Burnsall*, 6 D. & E. 30. *Doe d. Gilman v. Elvey*, 4 East, 313. *Merest v. James*, 4 Moore, 327. S. C. 1 Brod. & Bing. 197, and observations thereon. *Lees v. Mosley*, 1 You. & Col. 589. *Cursham v. Newland*, 2 Beav. 145. *Doe d. Cooper v. Collis*, 4 D. & E. 294, and observations thereon.
531. III. Trusts executory created by marriage settlement.
532. IV. Trusts executory created by will.
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- 533a. VI. Where the issue cannot take by purchase, on account of the rule against perpetuities.

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FIFTH EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, UNDER THE CY PRES DOCTRINE, IN THE CASE OF AN INTENDED PERPETUAL SUCCESSION OF LIFE ESTATES.

536. I. Perpetual succession of life estates, by way of executory trust; in favour of unborn descendants.
- 536a. II. Perpetual succession of life estates in favour of children in *esse* and more remote descendants.
Wollen v. Andrews, 2 Bing. 126, and observations thereon.
Brooke v. Turner, 2 Bing. New Cas. 422.
- 536b. III. Limited number of life estates.
Seaward v. Willock, 5 East, 598, and observations thereon.

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SIXTH EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, UNDER THE CY PRES DOCTRINE, WHERE THE WORD SON OR CHILD, IN A DEVISE OF AN ESTATE IN REMAINDER, IS CONSTRUED AS A WORD OF LIMITATION.

537. The rule stated.
Doe d. Garrod v. Garrod, 2 Bar. & Adol. 87. *Doe d. Jones v. Davies*, 4 Bar. & Adol. 49.

CHAPTER XVII.

CASES OF AN ESTATE TAIL, BY IMPLICATION SIMPLY, OR BOTH BY IMPLICATION AND BY ANALOGY TO THE RULE IN SHELLEY'S CASE, WITH A VESTED REMAINDER OVER, IN REAL PROPERTY, DISTINGUISHED FROM CASES OF A LIFE ESTATE, AND A CONTINGENT REMAINDER OVER, EITHER WITH OR WITHOUT AN ALTERNATIVE LIMITATION; OR OF A LIFE ESTATE, WITH A LIMITATION OVER OF A SPRINGING INTEREST; OR OF A FEE, WITH A CONDITIONAL LIMITATION OVER.

SECTION I.

Rules for determining whether an Indefinite Failure of Issue is imdant, or merely a Failure of Issue within a certain Time, in cases of a Limitation over on a Failure of Issue.

538. I. In devises of real estate before 1838, the words "die without issue," "die without leaving issue," "in default," or, "on failure," or, "for want of issue," were all held to import an indefinite failure of issue.

539. II. But in bequests of personal estate before 1838, the words "die without leaving issue," were not so construed, though the other expressions were construed in that manner.
Foley v. Irvin, 2 B. & B. 435. *Radford v. Radford*, 1 Keen, 486.
540. III. Where the devise to the issue male is introduced by words of contingency, and the limitation over is an alternative, to take effect in the opposite event of there being no son.
Loddington v. Kime, 1 Salk. 324.
541. IV. Where the devise is to the children of the prior taker, equally, and their heirs, with a limitation over in case he should die without issue, which is an alternative.
542. V. Where the devise is to the issue of the prior taker, and their heirs, with a limitation over in case he should die without issue, or all such issue should die without issue; which is both an alternative and a remainder after an estate tail.
543. VI. Words referring to a failure of *such* issue, import an indefinite failure of issue, or not, according to the degree of comprehensiveness of the antecedent expressions.
1. They do, where such expressions comprise all the issue generally, or male or female.
2. They do not, where such expressions comprise some only of the issue generally, or male or female.
As where the devise is to the sons, daughters, or children of the prior taker.
544. (1) Where they would take the fee, the limitation over in default of such issue, &c., is an alternative.
The King v. the Marquis of Stafford, 7 East, 521.
545. (2) Where they would take life estates, such limitation over is a remainder capable of taking effect either as an alternative, or as a remainder.
Goodright d. Lloyd v. Jones, 4 Mau. & Sel. 88. *Foster v. Lord Remney*, 11 East, 594. *Hay v. Lord Coventry*, 3 D. & E. 83.
546. (3) Where they would take estates tail, such limitation over is a remainder capable of taking effect either as an alternative or as a remainder.
Lady Dacre v. Doe, in error, 8 D. & E. 112; *Lewis d. Ormond v. Waters*, 6 East, 336.
547. VII. Where the issue are referred to by the name of children, and thereby explained to mean children.
Ellis v. Selby, 7 Sim. 352.
548. VIII. Where the issue are so referred to in the limitation of one moiety, but not in the limitation of another moiety.
Carter v. Bentall, 2 Beav. 551; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476.

549. IX. Where the property is limited over on death under a certain age, without issue.
Toovey v. Bassett, 10 East, 460.
550. X. Where a devise over is on death within a limited period, or without issue, and *or* is construed *und.*
551. XI. Where a devise over is on the prior taker's death under a certain age, or on his subsequent death without issue.
552. XII. Where a devise over is in the event of death without leaving issue, or having such issue, of such issue dying under a certain age without issue.
Beachcroft v. Broome, 4 D. & E. 441.
- 553—4. XIII. Where a bequest over is to the survivor, without words of limitation.
555. XIV. Where a bequest over is to the survivor, with words of limitation.
Massey v. Hudson, 2 Meriv. 180.
556. XV. Where property is bequeathed to two sisters, with a limitation over, on the death of one without issue, to her sister.
557. XVI. Where it is directed that the property shall go over after the prior taker's decease.
558. XVII. Where a limitation over is preceded by a bequest to such of the prior taker's issue as he shall appoint to.
559. XVIII. Where all the ulterior limitations are for life only.
Barlow v. Salter, 7 Ves. 483. *Boehm v. Clarke*, 9 Ves. 580.
560. XIX. Where the devise over is for payment of debts.
561. XX. Where the estate is subject to the payment of a sum to be disposed of by the will of the prior taker.
Smith v. Webber, 1 Bar. & Ald. 713. *Doe d. King v. Frost*, 3 Bar. & Ald. 546.
562. XXI. Where a term for raising legacies is limited on the expiration of an estate tail, and the legacies are held to be given on the same event.
Morse v. Lord Ormonde, 1 Russ. 382.
563. XXII. Enactment of Vict. c. 26, s. 29.

SECTION II.

Cases of a Limitation over on an Indefinite Failure of Issue of a Prior Taker, where there is no Express Devise to his Issue.

564. Rule of construction.
- 564a. The principle of this construction.
- 564b. Two co-existing yet inconsistent intents; namely, the primary or paramount intent, and the secondary or minor intent, which is sacrificed to the former.
- 564c. How the primary or paramount intent is manifested.
- 564d—8. This construction is adopted whether the prior limitation is expressly in fee, or indefinite, or for life.

Chapman d. Scholes v. Scholes, 2 Chitty, 643. *Denn d. Slater v. Slater*, 5 D. & E. 393. *Doe d. Nevile v. Rivers*, 7 D. & E. 276. *Doe d. Ellis v. Ellis*, 4 East, 352. *Tenny d. Agar v. Agar*, 12 East, 252. *Romilly v. James*, 6 Taunt. 263. *Dansey v. Griffiths*, 4 Mau. & Sel. 61. *Doe d. Jones v. Owens*, 1 Bar. & Ad. 318. *Doe d. Cadogan v. Ewart*, 7 Ad. & El. 636. *Machell v. Weeding*, 8 Sim. 4.

SECTION III.

Cases of a Limitation over on an Indefinite Failure of Issue of a Prior Taker, where there is an express Devise to his Issue, eo nomine.

569. I. Where the ancestor takes an estate tail in possession.
Franklin v. Lay, 6 Mad. 258. *Murthwaite v. Barnard*, 2 Brod. & Bing. 623. S. C. nom. *Murthwaite v. Jenkinson*, 2 Bar. & Cres. 359.
570. It is immaterial, in the supposed case, whether the expression in the devise over is "issue" indefinitely, or, "such issue."
Denn d. Webb v. Puckey, 5 D. & E. 299. *Frank v. Stovin*, 9 East, 548. *Marshall v. Bousfield*, 2 Mad. 166.
571. II. Where (upon principle) the ancestor would take an estate tail in remainder.
572. Absurdity of contrary doctrine.
573. Observations on the fact that there are decisions in support of the contrary doctrine.
Doe d. Blandford v. Applin, 4 D. & E. 82, and observations thereon. *Doe d. Cock v. Cooper*, 1 East, 229, and observations thereon. *Ward v. Bevil*, 1 You. & Jer. 512, and observations thereon.
- 574—5. III. Where no estate tail can be raised in remainder.

SECTION IV.

Cases of a Limitation over on an Indefinite Failure of issue of a Prior Taker, where there is an Express Devise to his Sons, Daughters, or Children.

576. I. Where (upon principle) the ancestor would take an estate tail in remainder.
577. Rules deduced by Mr. Jarman from the cases.
- 578—9. Observations on these rules.
Parr v. Swindells, 4 Russ. 283. *Franks v. Price*, Bing. New Cas. 37, and observations thereon.
580. Suggested result of the preceding cases and remarks.
Observations of Lord Chief Baron Richards on the intention of testators.
- 581—2. II. Where there can be no estate tail in remainder.
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583. III. Where the ancestor will take an estate tail in possession.
Mortimer v. West, 2 Sim. 274.

SECTION V.

Cases of a Limitation over on a Failure of Children only of the Prior Taker, or on a Failure of Issue within a certain Time.

584. Rule stated.
Doe d. Barnfield v. Wetton, 2 Bos. & Pul. 324. *Bennett v. Lowe*, 7 Bing. 535.

SECTION VI.

Cases of a Limitation over on an Indefinite Failure of Issue of a Person to whom no Express Devise is made.

585. I. Where the person whose failure of issue is spoken of is the testator's heir apparent or presumptive, and he takes an estate tail.
586. Reasons for this construction.
587. This construction not allowed in *Lanesborough v. Fox*, but admitted in other cases.
Daintry v. Daintry, 6 Durn. & East, 307.
588. H. Where the person whose failure of issue is spoken of is not the testator's heir apparent or presumptive, and he does not take an estate tail.
589. Reasons for this construction.

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CASES OF A VESTED REMAINDER AFTER A LIFE ESTATE, BY IMPLICATION, DISTINGUISHED FROM CASES OF A SPRINGING INTEREST.

590. I. Devise to testator's heir apparent or presumptive after the death of another to whom no devise is made, gives to the former a remainder.
591. II. A similar devise to the residuary devisee has the same effect.
592. III. A similar devise to one who is neither heir apparent or presumptive, nor residuary devisee, gives him a springing interest.

CHAPTER XIX.

LIMITATIONS OF PERSONAL ESTATE, SIMILAR TO LIMITATIONS WHICH WOULD CREATE AN ESTATE TAIL IN REAL ESTATE, ACCORDING TO THE TWELFTH, THIRTEENTH, AND SEVENTEENTH OF THE FOREGOING CHAPTERS.

593. Chattels cannot be entailed.
593a. General rule resulting from this.

- 593b. I. Bequests to or for a person and the heirs of his body.
 594. II. Limitations to or for a person, for life, with remainder to the heirs of his body, which would create an estate tail in real property.
 595. Grounds of the rule.
Elton v. Eason, 19 Ves. 73. *Britton v. Twining*, 3 Meriv. 176.
 596. III. Limitations to or for a person for life, with remainder to the heirs of his body, which would not create an estate tail in real property.
Wilkinson v. South, 7 D. & E. 555.
 597. IV. Disposition in favour of a person and his issue, which would create an estate tail in real property.
Donn v. Penny, 1 Meriv. 20. *Att. Gen. v. Bright*, 2 Keen, 57. *Gibbs v. Tail*, 8 Sim. 132. *Turner v. Capel*, 9 Sim. 158.
 597a. V. Disposition in favour of a person and his issue, which would not create an estate tail in real property.
 598. VI. Executory trusts in favour of a person and his issue.
Stonor v. Curwen, 3 Sim. 264.
 599. VII. Limitations over on an indefinite failure of issue.
 600. VIII. Limitations over on failure of children only, or of issue within a given time.
Stone v. Maule, 2 Sim. 490. *Bradshaw v. Skilbeck*, 2 Bing. New Cas. 182.

CHAPTER XX.

LIMITATIONS OF PERSONAL ESTATE TO OR IN TRUST FOR THE PERSONS WHO SHALL FROM TIME TO TIME BE ENTITLED TO REAL ESTATES ENTAILED.

601. 1. Where such limitations are not by way of executory trust.
Fordyce v. Ford, 2 Ves. 536. *Ware v. Polhill*, 11 Ves. 257.
 602. II. Where the disposition is by way of executory trust.
 603. The distinction exhibited in these two rules is in accordance with the distinction made in other cases.
 604—6. The grounds of the distinction.
 607. Executory trusts should be construed according to the second rule;
 608. especially when created by marriage settlement or articles.
 609—13. A gift through the medium of a direction, is not necessarily a trust executory.
 614. The words “so far as the rules of law will permit,” preclude any intendment contrary to law.
 615. But they do not enable the Court to tie up chattels for any longer time.

616. *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387.
Countess of Lincoln v. Duke of Newcastle, 12 Ves. 218.
617. Difference of opinion among the Judges.
618. Observations of Lord Loughborough.
619. Observations of Lord Eldon in the same case,
620. and in *Jervoise v. Duke of Northumberland*.
- 621—2. Meaning of the expressions used by Lord Loughborough.
623. An executory trust by will ought not to be construed so as to confer an indefeasible vested interest on the first tenant in tail at his birth.
624. And in fact no such construction of an executory trust has been adopted.
Foley v. Burnell, 1 Bro. C. C. 274, was not an executory trust. Nor was *Vaughan v. Burslem*, 3 Bro. C. C. 101. Nor was *Carr v. Lord Erroll*, 14 Ves. 478.
625. Lord Eldon supposed that directory trusts were synonymous with executory trusts.
- 626—8. Objection urged by Lord Eldon.
- 629—30. Observations on some other remarks of Lord Eldon.
631. Observations of Lord Erskine.
632. Remarks thereon.
Gower v. Grosvenor, 5 Mad. 347.
633. Observations thereon.
- 634—7. Concluding observations on the cases above cited.

CHAPTER XXI.

WORDS APPARENTLY AMOUNTING TO A MERE ALTERNATIVE LIMITATION, BUT IN REALITY CONSTITUTING A REMAINDER; AND VICE-VERSA.

SECTION I.

- 638—45. *A General Rule suggested.*

SECTION II.

Certain Rules of a more Specific Character.

646. Devise to a person, and his issue, or his sons, daughters, or children, with a limitation over on his death without issue, &c.
647. I. Where the ancestor or his issue take an estate tail, or the issue take a life estate in remainder, and such estate is vested and absolutely limited.
Ashley v. Ashley, 6 Sim. 358. *Doe d. Jearrod v. Bannister*, 7 Mees. & W. 292.
648. II. Where such estate is contingent, or hypothetically limited.
649. III. Where such estate is in fee.

CHAPTER XXII.

CERTAIN CASES OF CONDITIONAL LIMITATIONS DISTINGUISHED FROM CASES OF MERE ALTERNATIVE LIMITATIONS; AND VICE VERSA.

SECTION I.

Certain General Rules suggested.

650. Introductory observations.
- 651—4. I. Where the prior interest in fee is not vested and absolutely limited, and the subsequent limitation is an alternative. *Murray v. Addenbrook*, 4 Russ. 407.
655. II. Where the prior interest is vested and absolutely limited, and the subsequent limitation is a conditional limitation. *Sturgess v. Pearson*, 4 Mad. 413, and observations thereon. *Browne v. Lord Kenyon*, 3 Mad. 410; and observations thereon. *Bromhead v. Hunt*, 2 Jac. & Walk. 463. *Howes v. Herring*, McClell. & You. 295, and observations thereon.

SECTION II.

Certain Specific Rules as to the Period to which the Event of Death, when mentioned as if it were a Contingent Event, is to be referred.

- 656—7. I. Where personal estate is limited over "in case" or "in the event of" death, and the death is held to be a death in the testator's lifetime. *Hinckley v. Simmons*, 4 Ves. 160, and observations thereon. *Cambridge v. Rous*, 8 Ves. 12. *Slade v. Milner*, 4 Mad. 144. *Ommaney v. Bevan*, 18 Ves. 291. *Crigan v. Baines*, 7 Sim. 40. *Lord Douglas v. Chalmer*, 2 Ves. Jun. 500.
658. II. Where personal estate is so limited over, and the death is held to be a death in the lifetime of a prior taker. *Hervey v. McLaughlin*, 1 Tri. 264. *Clarke v. Gould*, 7 Sim. 197. *Le Jeune v. Le Jeune*, 2 Beav. 701. *Smith v. Smith*, 8 Sim. 353. *Giles v. Giles*, 8 Sim. 360.
- 659—60. III. Where personal estate is so limited over, and the death is held to be a death at some other period.
661. IV. Where the gift over is introduced by other words of contingency. *King v. Taylor*, 5 Ves. 806. *Turner v. Moor*, 6 Ves. 556. *Webster v. Hale*, 8 Ves. 410. *Smart v. Clark*, 3 Russ. 365.
662. V. Where the gift over is not simply on the event of death.
663. Grounds of the rule. *Doe d. Lifford v. Sparrow*, 13 Ves. 359. *Galland v.*

AN ANALYSIS OF THE FOLLOWING

Leonard, 1 Swans. 161. S. C. 1 Wils. 129. *Horne v. Pillans*, 2 M. & K. 15. *Monteith v. Nicholson*, 2 Keen, 719, and observations thereon.

664. VI. The same construction seems applicable to real estate.
 665. Exception.
 666. There is however a decision against the application of this construction to real estate. But perhaps that decision is questionable.
Bowes v. Scowcroft, 2 You. & Coll. 640, and observations thereon.

CHAPTER XXIII.

CERTAIN CASES OF VOID CONDITIONAL LIMITATIONS DEPENDING ON THE NON-DISPOSAL OF PROPERTY, DISTINGUISHED FROM LIMITATIONS IN DEFAULT OF APPOINTMENT.

667. The rule stated.
Ross v. Ross, 1 Jac. & Walk. 158. *Cuthbert v. Purrier*, Jac. 415.

CHAPTER XXIV.

LIMITATIONS OPERATING DIFFERENTLY IN REGARD TO ANOTHER LIMITATION IN DIFFERENT EVENTS.

668. I. An interest may be limited to take effect either as an alternative, or as a remainder or *quasi* remainder.
 668a. II. An interest shall, if possible, be construed as a remainder or *quasi* remainder, as well as an alternative.
Brownsword v. Edwards, 2 Ves. 243.
 669. III. Every remainder or *quasi* remainder has the effect of an alternative limitation; in case the preceding interest never vests.
Toldervy v. Colt, 1 You. & Coll. 621, and observations thereon.
 669a. Consequence of the above rule, as regards chattels which are to go to the persons entitled to real estates entailed.
 670. Instance of a remainder taking effect as such, though taking effect as an alternative as regards the possession.
 670a. IV. An interest may be limited to take effect either as an alternative or as an interest under a conditional limitation.
 671. V. A mere conditional limitation will have the effect of an alternative, if the prior interest never vests.
 671a. So also will a limitation of a springing interest of the seventh kind.

672. Principle of the third and fifth rules.
Meadows v. Parry, 1 V. & B. 124. *Murray v. Jones*, 2 V. & B. 313. *Mackinnon v. Sewell*, 2 M. & K. 202; and observations thereon. *Mackinnon v. Peach*, 2 Keen, 555. *Wilson v. Mount*, 2 Beav. 397.
- 672a. Exception:
Roulledge v. Dorril, 2 Ves. Jun. 356.
673. VI. Conditional limitation becoming a remainder in the room of a preceding remainder in fee.
Doe d. Harris v. Howell, 10 Bar. & Cres. 197, 202.
674. VII. A future interest is not construed an interest under a conditional limitation or a springing interest, when it can be construed a remainder.
675. But when the preceding freehold fails, a future interest, which would otherwise have been a remainder, is construed a springing interest.
676. And an ulterior interest in remainder also becomes a springing interest, abstractedly regarded, though it is a remainder as regards the less remote springing interest.
677. And so, in other cases, until a less remote future interest vests, an ulterior interest in remainder is a springing interest, abstractedly considered, though it is a remainder as regards such less remote future interest.
Doe d. Scott v. Roach, 5 Mau. & Sel. 482.

CHAPTER XXV.

LIMITATIONS OPERATING DIFFERENTLY IN REGARD TO DIFFERENT LIMITATIONS.

- 678—81. I. The same limitation may be a remainder, an alternative, and a conditional limitation.
682. II. The same limitation may be an alternative and an augmentative limitation, or a limitation of a springing interest.
- 682a. III. Every more remote limitation may be a remainder as regards a prior limitation, though not limited next after it.
Doe d. Herbert v. Selby, 2 Bar. & Cres. 926.

CHAPTER XXVI.

LIMITATIONS INTENDED TO OPERATE IN DIFFERENT WAYS IN REGARD TO DIFFERENT PORTIONS OF PROPERTY.

683. Limitations may operate in this way.
684. I. A limitation may be penned so as to operate as a condi-

685. tional limitation and as a limitation of a springing interest, in regard to different portions of property.
686. II. A limitation may be so penned as to operate as an alternative and as another kind of limitation, in regard to different portions of property.
687. Objection.
687. *Malcolm v. Taylor*, 2 Russ. & M. 416, and observations thereon.

PART III.

RULES AND PRINCIPLES RELATING TO MISCELLANEOUS POINTS IN THE LEARNING OF EXECUTORY INTERESTS.

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PART I.

**THE VARIOUS KINDS OF INTERESTS, AND THE DIFFERENT
SORTS OF CONDITIONS AND LIMITATIONS ON WHICH THEY
DEPEND OR BY WHICH THEY ARE CREATED OR AFFECTED,
ANALYTICALLY ARRANGED, DEFINED, AND DISTINGUISHED.**

CHAPTER THE FIRST.

THE DIFFERENT KINDS OF CONDITIONS, ON WHICH INTERESTS MAY DEPEND, OR BY WHICH THEY MAY BE AFFECTED, ANALYTICALLY ARRANGED, DEFINED AND DISTINGUISHED.

- 1 It is impossible to obtain an accurate knowledge of Knowledge the interests which form the subject of the following of conditions pages, without an accurate acquaintance with the various is essentially kinds of conditions on which they depend, or by which they necessary. may be affected.
- 2 Conditions, in the widest sense of the term, may be Division of be divided into conditions, in the widest sense of the term.
 - I. Express, which are either
 1. Direct, or
 2. Indirect.
 - II. Implied.
- 3 Again, they may be divided into A second division of conditions, in the widest sense of the term.
 - I. Conditions properly so called.
 - II. Defeasances.
 - III. Special or collateral limitations, in the original sense of limits or bounds.
- 4 Conditions properly so called may be distributed into Division of several kinds: conditions properly so called.
 - I. General conditions.
 1. Subsequent, or simply destructive, which, as affecting lands or tenements, are either.
 - (1) Of the concise or implied form, or
 - (2) Of the unconcise or explicit form.
 2. Precedent, or simply creative, (on which the following interests depend: viz.

Interests limited hypothetically ;

Springing interests ;

Alternative interests ;

Contingent interests in the whole or the immediate part of a reversion, and

Contingent remainders.)
 3. Mixed.
 - (1) Destructive and creative, (on which the following interests depend: viz.

Interests under augmentative limitations.
Interests under diminuent limitations;
and

Interests under conditional limitations.)

(2) Destructive and accelerative,
or clauses of cesser and acceleration.

II. Special conditions.

Definition of * AN EXPRESS CONDITION, as the term imports, is a 5
an express condition expressed in words: and it is sometimes
condition. termed a CONDITION IN DEED.(a)

— of an im- AN ^b IMPLIED CONDITION, which is sometimes term- 6
plied condi- ed a CONDITION IN LAW, is a condition which is not
tion. expressed, but is annexed by construction of law, for the
avoidance of an estate in a particular event.(b)

— of a direct A DIRECT CONDITION, in its widest sense, is an hy- 7
condition. pothetical or suppositive member of a sentence, upon
which the creation, enlargement, diminution, or defeasance of
an estate, or the suspension of the beneficial interest in

— of an in- property, expressly or constructively depends. * AN 8
direct condi- INDIRECT CONDITION is one that, in certain cases at
tion. least, is denoted by the word "for," in grants of one thing
for another, which is not granted or covenanted to be given
or done in return.(c)

— of a gene- A ^d GENERAL CONDITION(d) is * a clause providing, 9
[5] or constructively importing, that an estate shall be
ral condition. created, enlarged, diminished, or defeated in a given 10
See § 16. event.(e) A ^f SPECIAL condition is a clause which

Definition of merely suspends an estate, or the beneficial interest therein,
a special con- to answer a special purpose. Of this nature are clauses that
dition. provide, that in case the rent reserved on a lease shall be in

Examples of arrear, the lessor may enter, and hold until the arrears of
special con- rent be satisfied;(f) and clauses * providing, that when any
ditions. heir of the grantee of a rent newly created, should be under
age, the rent should cease during his non-age; and clauses
whereby lands are limited to the use, intent and purpose,
that if a rent-charge should be in arrear, the grantee, his
heirs or assigns, might enter until the rent should be paid
and satisfied.(g)

Division of General conditions are usually divided into^h con- 11
general con- ditions precedent and subsequent(h). But it would
ditions.

(a) See Co. Litt. 201 a. Shep. T. 117.

(b) See Shep. T. 117, 118. Co. Litt. 201 a; 332 b. Litt. 378.

(c) See Co. Litt. 204 a. Shep. T. 124, 125, and note 17.

(d) See Co. Litt. 203, Butler's note (3).

(e) See Co. Litt. 204 a. Shep. T. 117.

(f) Litt. 327. Co. Litt. 203 a, Butler's note (3).

(g) See Fearn, 527, 528.

(h) Co. Litt. 201 a. Shep. T.

seem that they may be more properly distributed, as above,
into subsequent, precedent, and mixed.

12 A **CONDITION SUBSEQUENT** is a direct condition Definition of
that is 'annexed to an estate or interest created by a condition
a previous clause or instrument, and upon the fulfilment or subsequent.
upon the breach of which, according to the form of the con-
dition, such estate or interest is to be prematurely(i) defeated See § 26, 34,
or determined, and no other estate is to be created in its 36.
room:(k) as, 'where a lease is made for years, on condition See § 149.
that the lessee shall pay 10*l.* to the lessor at Michaelmas, or
else his lease shall be void.(l)

13 A **CONDITION PRECEDENT** is a direct condition — of a con-
which is not annexed to an estate created by a pre- dition prece-
vious clause or instrument, but "upon the fulfilment of which dent.
an estate or interest is to arise or be created: as, where it is See § 149,
agreed that if *J. S.* pay me 10*l.* at Michaelmas, he shall have [6]
such a ground of mine for 10 years.(m) 137, 147.

14 A **MIXED CONDITION** is a direct condition, which —of a mixed
is annexed to an estate created by a previous clause condition.
or instrument, and is destructive in its operation as regards
that estate, and creative or accelerative as regards another
estate.

15 There are two forms, as we have already seen, Two forms of
of conditions subsequent, as they affect lands or conditions
tenements. subsequent.

16 A condition subsequent of the **CONCISE OR IM- — of a con-
PLIED FORM**, is a proviso subjoined to a grant, lease, dition subse-
or devise, and beginning with the words, on condition &c., quent of the
provided &c., or so that &c., or, in the case of a lease for concise or
years, with words of a similar import, and not followed by implied form.
any remainder over, or by any stipulation or regulation for See § 39.
the reverter or transfer of the property, but "*ex vi propria*, See § 17,
(n) conferring "on the donor, deviser, or lessor, and his re- 149.
presentatives, the right of bringing an action to avoid the
estate.(n)

17 A condition subsequent of the **UNCONCISE OR — of a con-
EXPLICIT FORM**, is a sentence subjoined to a grant, dition subse-
lease, or devise, providing, in terms or in effect, that, in a quent of the
given event, the property comprised in such grant, lease, or unconcise or
devise, shall revert "to the donor, lessor, or deviser, or his explicit form.
representatives,(o) before the estate created by such grant,

(i) See Prest. Shep. T. 117, 118, 127.

(k) See Shep. T. 117.

(l) Shep. T. 118.

(m) Shep. T. 117.

(n) See Litt. 328, 329. Shep. T. 121.

(o) See Prest. Shep. T. 153.

(p) See Shep. T. 120, 127, 149.

lease, or devise, shall have filled up the measure of duration given to it thereby, and reserving to confer on him and them, in that event, the right of bringing an action to avoid the estate accordingly. (p)

The two forms of conditions subsequent illustrated.

The following passage from Sheppard's Touchstone will clearly elucidate the foregoing definitions of the two different forms of conditions subsequent: "Know therefore, that, for the most part, conditions have conditional words on their frontispiece, and do begin therewith; and that, amongst these words, there are three words that are most proper, which, in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod, and sub conditione*. And therefore, if *A.* grant lands to *B.*, to have and to hold to him and his heirs, provided that, or so as, or under this condition, that *B.* do pay to *A.* 10*l.* at Easter next; this is a good condition; and the estate is conditional, without any more words. But there are other words, as, *Si, si contingat, and the like*, that will make an estate conditional also; but then they must have other words joined with them, and added to them, in the close of the condition, as, that then the grantor shall re-enter, or that then the estate shall be void, or the like. And therefore, if *A.* grant lands to *B.* to have and to hold to him and his heirs; and if, or, but if it happen, the said *B.* do not pay to *A.* 10*l.* at Easter, without more words, this is no good condition; but if these, or such like words be added, that then it shall be lawful for *A.* to re-enter; then it will be a good condition." (q)

Definition of a mixed condition of the destructive and creative kind.

See § 12, 16, 17.

Mixed conditions sometimes termed precedent, and sometimes subsequent.

Mixed conditions dis-

Mixed conditions in general have already been defined. A mixed condition of the DESTRUCTIVE AND CREATIVE KIND, is a direct condition that is annexed to an estate created by a previous clause or instrument, and upon the fulfilment of which, such estate is to be defeated, and another estate is to arise in its room.

These last-mentioned conditions, however, which are here termed mixed, or the limitations of which they form a part, are frequently designated conditions precedent, in contradistinction to those conditions proper which are termed conditions subsequent, and are simply destructive. And, on the other hand, they are sometimes termed conditions subsequent, in contradistinction to those clauses which are simply creative.

From these mixed conditions, we must be careful to distinguish those conditions subsequent in

(p) Prest. Shep. T. 153.

(q) Shep. T. 121, 122. See also Co. Litt. 380, 331.

which the act required in the condition to be performed, is, tingished to create an estate: as where one makes a feoffment [8] in fee, on condition that the feoffee shall make an estate from certain back again in tail to the feoffor, and his wife, before such a others.

day.(r)

22 A MIXED condition of the DESTRUCTIVE AND AC- Definition of
CELERATIVE KIND, OR, A CLAUSE OF CESSER AND a mixed con-
ACCELERATION, is a proviso following the limitation of seve- dition of the
ral successive estates in the same subject of property, and in destructive
effect directing, that, in a given event, one or more of the and accele-
first limited of such estates shall cease; and the estate or rative kind.
estates in remainder be thereupon accelerated, and take
effect as if such first limited estate or estates had expired
according to the terms of their original limitation.

Lands were devised to *R.* for life, remainder to trustees *The Earl of*
to preserve, &c., remainder to *R.*'s first and other sons in tail *Scarbo-*
male, with similar remainders in favour of *I.*, a younger *rough v.*
brother of *R.*, and his sons, and of *F.*, another younger bro- *Doe d.*
ther of *R.*, and his sons, and of other younger brothers of *R.*, *Savile, 3 Ad.*
and their sons, respectively. And the will contained a pro- & El. 897.
viso, that if the title to a certain Earldom should descend to
any of them, the said *R.*, *I.*, *F.*, &c., or to any of their sons,
(within any of the lives, &c.) then, and in such case, and as
and when the title should come to him or them, the estate
which he or they should then be entitled to in the lands,
under or by virtue of the will, should cease, determine, and
become void; and the lands should immediately go to the
person or persons, who, under the limitations aforesaid,
should then be next in remainder expectant on the decease
and failure of issue male of the person to whom the title
should so come, in the same manner as such person or per-
sons so in remainder would take the same by virtue of the
will, in case he or they to whom the title should come was
or were actually dead without issue. The title descended
to *R.*, while in possession of the lands, whereupon *I.* took pos-
session; and he and his eldest son joined in suffering a re-
covery. It was held by the Court of Exchequer Chamber,
reversing the judgment of the Court of King's Bench, that the
proviso was a proviso of cesser and determination only of the
old estates, so as to accelerate and let in the enjoyment of the
remainders over, and not a proviso which created any new
estates in remainder; and consequently, that, by the recovery,
the old remainder for life in *F.*, and the old remainder in tail
in his son, were effectually barred. (3 Ad. & El. 965.) For,
as Lord Chief Justice Tindal observed, the effect of the pro-
viso was, that if the title descended upon a tenant for life,

[9]

(r) Prest. Shep. T. 134. And see Litt. 352—353.

the estate of such tenant for life, and the estates tail in remainder in all his sons successively, ceased, by necessary implication; if it descended upon one of the sons, the tenants in tail, the estate tail in such son of the tenant for life failed only, and the manors would go over to his next brother in tail. (Ib. 966.) And that the remainder-men were to take as if the prior estates had determined by the natural course of their determination, viz. the death of the person to whom the title descended, and the failure of his issue, which provision pointed to the mere blotting out of the prior estates, and to the accelerating the old estates in remainder already created by the will, and not to the creating of new estates. (Ib. 967.)

* **DEFEASANCES** are provisoes of the same import 23
Definition of and efficacy as proper conditions* subsequent, but
a defeasance. are contained in a distinct deed, either delivered at the same
* See § 12, time with the deed to which the condition relates, or, except
16-19. in the case of things executory or chattels, delivered after the
deed to which the condition relates.(s).

CHAPTER THE SECOND.

**THE DIFFERENT KINDS OF LIMITATIONS, IN THE ORIGINAL
SENSE OF LIMITS, BY WHICH INTERESTS MAY BE REN-
DERED DETERMINABLE, ANALYTICALLY ARRANGED, DE-
FINED, AND DISTINGUISHED.**

Two senses **GREAT** confusion has frequently arisen from not 24
of the word observing that the word limitation is used in two
"limitation," different senses; the one of which may, for the sake of con-
viz.—venience of distinction, be termed the original sense; name-
the original ly, that of a member of a sentence, expressing the limits or
sense, bounds to the quantity of an estate; and the other, the deriva-
and the deri- tive sense; namely, that of an entire sentence, *creating(a)
vative sense. and actually or constructively marking out the quantity of
an estate.

See § 3. In the preceding chapter, Conditions, in the 25
widest sense of the term, were divided into Condi-
tions properly so called, Defeasances, and Special or Collate-
ral Limitations in the original sense. The first two formed
the subject of that chapter. It will now be necessary brief-
ly to treat of the third.

(s) See Co. Litt. 236 b; 237 a. Prest. Shep. T. 126.

(a) See Prest. Shep. T. 117.

26 A limitation, in the original sense of a limit or Definition of bound, which, as well as an implied condition, is a limitation, sometimes called a condition in law, (b) is a restrictive ex- in the ori- pression, which serves to mark out the limits or * bounds of ginal sense. an estate. (c) See § 6.

27 Such limitations may be divided into— See § 12, 16-19.

I. General.

1. Expressed.

2. Implied.

II. Special or collateral.

1. Regular.

(1) Direct.

(2) Indirect.

2. Irregular.

Division of such limi- tations.

[11]

28 A GENERAL limitation is a restrictive expression, Definition of which determines the general class or denomina- a general tion, in point of quantity of interest, to which an estate be- limitation. longs, by confining it to the period during which there shall be a succession of heirs general or special, or of persons filling a given corporate capacity, or to the period of a life or lives, or of a certain number of years.

29 It is necessary to the very existence of law, that Necessity for estates should be distributed into certain classes, division of known by certain denominations, and that every estate estates into should be referable to one or other of these classes. And classes, and hence a general limitation, which, as we have seen, deter- consequently mines the general class and denomination to which an estate limitation to belongs, is incident to every estate. every estate.

30 The general limitation, however, may either be General lim- expressed by the words of the instrument creating itations either the estate, or may be implied by construction of law. express or implied.

31 Thus, where land is granted to A. and his heirs, Examples of the words, "and his heirs," constitute a general express gen- limitation: they serve to mark out the limits of the estate; eral limit- to ascertain the quantity of interest; and thus to determine ations. to what general class and denomination the estate belongs; denoting that the estate is one of that class of estates which are termed estates in fee. And similarly the words, "and the heirs of his body," "for life," "for years," are general limitations, denoting that the estates are respectively estates tail, freeholds not of inheritance, and chattel interests.

32 Where land is granted to A. and his heirs for the life of B., the words, "for the life of B." form the general limitation. *The words, "and his heirs,"

(b) Co. Litt. 234 b; 236 b. Shep. T. 121.

(c) Shep. T. 117.

are not words of limitation, in this case; but point out the persons, who, according to the common opinion, were to take as special occupants, during the residue of *B.*'s life, after the death of *A.* Where the words, "his heirs," are words of limitation, they denote a fee; whereas, it is allowed on all hands, that the grant in question does not create a fee of any kind. (*d*)

[12]

Instances of implied general limitations.

Where land is devised to *A.* for ever, the general limitation, "and his heirs," is implied. So, where land was devised to *A.* indefinitely, before the year 1838, the general limitation, "for life," was implied by construction of law. And now, by the stat. 1 Vict. c. 26, where land is devised in that manner, by a will made since the beginning of the year 1838, the general limitation, "and his heirs," is implied: for by that statute, such a devise will pass the fee.

33

Definition of a special or collateral limitation.

See § 12, 16: 19, 148-9:

A SPECIAL limitation is a qualification serving to mark out the bounds of an estate, so as to determine it, *ipso facto*, in a given event, without action, entry, or claim, before it would or might otherwise expire by force of or according to the general limitation. (*e*) This is sometimes denoted by the expression, "a determinable quality." (*f*)

34

Examples of special limitations.

Thus, where land is limited to *A.* for 99 years, "if he shall so long live," (*g*) the words, "for 99 years," form the general limitation, denoting that the interest is a chattel interest for 99 years; and the words, "if he shall so long live," constitute a special limitation, which would determine his estate on his death. This estate, therefore, is of precisely the same eventual duration as an estate limited to *A.* for life, in consequence of the addition of the special limitation. But the difference in the general limitation in the two cases, creates the important distinction between them, that the one is but a chattel interest, whereas the other is a freehold. Again, where land is granted to *A.* "till &c., or so long &c., or if &c., or whilst &c., or during, &c.," (*h*) the estates so limited have two limitations: for, the law gives a life estate to *A.* implying the words "for life," so as to constitute an implied general limitation, while the words till &c., form an additional and special limitation.

35

[13]

Remarks on collateral limitations. And if the term, "collateral

36

(*d*) See Bl. Com. 259, 260; Fearn, 496—500.

(*e*) See Co. Litt. 214 a; 234 b; 235 a. Prest. Shep. T. 139, 146.

(*f*) Fearn, 10, note (*h*).

(*g*) See Co. Litt. 214 b. Shep. T. 125, 151.

(*h*) See Co. Litt. 214 b; 234 b; 235 a. Shep. T. 125, 151, 140.

limitation," is used as referring to an event which is collateral to the general limitation, it is not incorrect. But if the "collateral" term is used from a notion that these limitations form no part of, and are independent of, and collateral to, the original measure of the estate, in the same manner as a conditional limitation, or a condition subsequent properly so called, such a notion is inaccurate,⁽ⁱ⁾ and the inaccuracy is one of a fundamental and most important character. For it must be observed, that where an estate has a special limitation as well as a general limitation, it has but one original and eventual measure of duration depending on two limitations, and capable of expiring by force either of the one or the other of them, which shall first happen, on the occurrence of the event which constitutes the bound or limit. Thus, in the above-mentioned case of an estate limited to *A.* for 99 years, if he shall so long live; there is but one original and eventual measure of *A.*'s interest, depending on the effluxion of the 99 years, or the dropping of his life, which shall first happen. The fact that these special limitations are not collateral to the original measure given to the estates to which they are annexed, constitutes the fundamental distinction between them and conditional limitations specifically and properly so called, as will appear in subsequent parts of the present Essay. See § 148-9, 12, 16—19.

37 Special limitations, according to the foregoing division, are either regular or irregular.

38 A REGULAR limitation is a restriction which does not begin with the words, "on condition," "provided," or "so that," and which, by forming a part of a sentence whereby an estate is created, serves to mark out the original limits of such estates; as ^k where an estate is granted to *B.* and his heirs till he be promoted to a benefice.^(k) An IRREGULAR limitation is a proviso annexed to an estate capable of supporting a remainder, and beginning with the words, "on condition," "provided," or "so that," but followed by a distinct sentence creating a remainder over in favour of another person, and, for that reason, construed as if forming a part of the sentence whereby the preceding estate is created, so as to mark out the original limits thereof. Thus, ^l if a devise be to *A.* for life, on condition that he do not marry *C.*, with remainder to *B.*; this is construed as if it were to *A.*, until he shall marry *C.*; and then, or upon death, to *B.*^(l) The proviso, "on condition" that he do not marry *C.*, is construed

See § 16.

39 — of an irregular special limitation. See § 159.

(i) See Fearn, 10, note (A).

(k) Shep. T. 125. See also Shep. T. 151.

(l) Burton's Compendium, § 829. See also *Scatterwood v. Edge*, as stated, Fearn, 237: and *Page v. Hayward*, 2 Salk. 570, as stated, Fearn, 424.

as if it formed a part of the sentence devising the estate to *A.* for life, and constituted an additional limit to the measure originally given to that estate, instead of being deemed to operate as a proper condition subsequent, so as to defeat such estate in favour of the heir of the testator, or as a conditional limitation, so as to defeat such estate in favour of *B.*, before it had filled up the measure of duration given to it by the terms of the clause by which it was created.

Qualification of a regular limitation. It may here be observed that cases have arisen 40
 "where a regular limitation has been qualified by the subsequent words, so as to prolong the duration of the estate beyond the period when it would expire simply by force of the regular limitation."*(m)*

Definition of a direct regular limitation. A DIRECT limitation is a restriction couched in 41
 words which directly express a limit to the quantity of the interest created; as, to *A.* during &c., or till &c., or whilst &c., or so long &c. An INDIRECT limitation is a restriction put in a conditional form, or in words which only imply a limit to the quantity of the interest created; (as, where land is given to *A.* for 99 years, if *A.* shall so long live, or if *A.* continue &c.) or, by words of description which attach a certain character or qualification to the objects of the grant or devise, so as to qualify the generality thereof, and indirectly to limit the duration of the estate to such a time as they shall continue to sustain that character; as, where land is granted to *A.* and his heirs, lords of the Manor of Dale. And "where an estate is limited to the use of *B.* and his heirs, he and they taking &c., and continuing to take, &c. the name and arms of *A.*; this is an indirect limitation, so that the estate can endure no longer than *B.* and his heirs comply with the condition."*(n)* 42

[15]

Same contingency may be both a special limitation, and a condition precedent. It may here be observed, that the same contingency may form both a special limitation, as to a preceding interest, and also a condition precedent, as to a subsequent interest limited so as to depend entirely upon it, as a contingent remainder. 43

(m) See *Doe d. Dean and Ch. of Westminster v. Freeman and Wife*, 1 D. & E. 389, as stated, Fearn, 240.

(n) See Litt. 597, (2) II. 3.

CHAPTER THE THIRD.

THE DIFFERENT KINDS OF INTERESTS ANALYTICALLY ARRANGED, DEFINED, AND DISTINGUISHED.

SECTION THE FIRST.

Introductory Definitions and Observations.

- 44 I. AN interest in any subject of property, in the widest or popular generic sense of the word interest, (See § 65, 84.) is that connexion which subsists between a person and such subject of property. Definition of an interest, in the widest sense of the term.
- 45 II. A right or interest, in this sense of the term, in real hereditaments, may either be altogether perfect, or it may be perfect at law, or perfect in equity, or perfect both at law and in equity. It may be so perfect, that nothing could render the hereditament which is the subject of the right or interest, or at least our part or share thereof, more completely *our own*, at law, or in equity, or both at law and in equity, as the case may be, for the time such interest endures. Rights or interests either perfect or imperfect. A perfect interest described.
- 46 III. This perfect interest is the interest denoted by the word **PROPERTY** or **OWNERSHIP**, which may be defined to be, that exclusive right, at law, or in equity, or both at law and in equity, which the jurisprudence of the country creates, in favour of a particular person, in regard to a given thing. Definition of property or ownership.
- 47 IV. This too is denoted by the word **SEISIN**, which specifically signifies that perfect legal interest, ownership, or property, of which real hereditaments are susceptible; or, that kind of possession which is incident to, and necessarily included in, and cannot exist apart from, legal ownership or property, as resulting from that exclusive right which the law creates in favour of a particular person, in regard to real hereditaments. Definition of seisin.
- 48 V. And a person who is invested or clothed (*vestitus*) with this perfect interest, ownership, or property, or has this kind of possession, is said to have a **VESTED** interest, or a present or actual **ESTATE** in the land: and if the ownership of the land is a legal and not merely an equitable ownership, he is said to be **SEIZED** of the land. Whereas a person who has only an imperfect interest exist- [17]
When a person is said to have a vested interest or actual estate, and to be seised.

When he is not said to have a vested interest, or to be seised. ing collaterally to this perfect interest, is not said to have a vested interest, or a present or actual estate in the land, but has only an executory interest; or an interest for a term of years conferring the possession for a limited period, with or without the beneficial interest during that period; or a *quasi* interest; or a mere precarious possession; or a power of appointment, a charge, or a lien; the nature of which will be explained in the next section.

Different modes of possession. VI. Possession may be either *personal, or by substitute, as by one's termor for years, whose interest, though not connected in title with our own, is not inconsistent with it. Or, it may be either actual, where the land is occupied by one's self or one's bailiff; or virtual, where it is occupied by a tenant for years, or by a termor for years whose title is consistent with our own. Or, it may be either executed, as where the land is occupied by one's self, or one's bailiff; or executory, as in the case of a remainder-man or reversioner, during the continuance of the particular estate of freehold, or of the heir (before entry) of a person who died actually seised.(a) 49

Three kinds of interests commensurate with duration of real hereditaments; viz. legal ownership, equitable ownership, and mere possession. VII. Real hereditaments are susceptible of three kinds of interests, in the widest sense of the term, which are commensurate with the duration of such hereditaments: first, the legal seisin, property, or ownership; secondly, the equitable or beneficial interest, property, or ownership; thirdly, the mere possession, rightful and unlimited. And the same person may have either the legal seisin, or the equitable interest alone; or he may have any two of these three kinds of interests; or he may have all the three. And consequently the mere possession and the equitable interest may either be conjoined with, or may exist apart from and collaterally to, the legal seisin, property, or ownership. 50

These may be either united or disunited.

Other interests which are not commensurate with the duration of real hereditaments, and are always collateral to the legal ownership. See § 48. VIII. Besides these three interests, there are others which are not co-extensive with the duration of real hereditaments, and are of an imperfect character, and essentially and not merely accidentally and occasionally apart from and collateral to the legal seisin, property, or ownership. Of this nature are executory interests, which only comprise a part or the whole of the property or ownership posterior to the event or period on which they are to vest. And such are the other imperfect interests enumerated above, and defined in the next section. 51

(a) With reference to these different kinds of possessions, compare 2 Bl. Com. 144, 209, with Burton's Compendium, § 302—304.

52 IX. The legal seisin, property, or ownership, Legal owner-
 being of unlimited duration, that duration is capa- ship divisible
 ble of being divided into an indefinite number of constituent into consti-
 periods of the measure of freehold, by means of the general tuent pe-
 and special limitations which form the subject of the pre- riods, and
 ceding chapter; and there may be an indefinite number of distributable
 owners, answering to the several periods, having interests in either among
 remainder or succession one after another. And the entire successive
 legal seisin, property, or ownership in fee, or the legal seisin, owners,
 property, or ownership for any such constituent period, is or among
 also capable of being divided among or given to an indefi- contempora-
 nite number of persons, as contemporaneous tenants, by neous
 way of coparcenary, joint-tenancy, or tenancy in common, owners,
 or by way of a tenancy by entireties. And, whe- each of
 53 ther the individuals are to enjoy the land succes- whom has a
 sively, as in the first case, or simultaneously, as in part of the
 the second, the interests of the several persons are integral seisin, and a
 parts of one and the same entire legal seisin, property, or vested inter-
 ownership, and are all equally entitled to the denomination est or actual
 of vested interests or actual estates. estate.

54 X. But the legal seisin, property, or ownership, But it cannot
 whether in fee or otherwise, cannot reside in two reside in two
 different individuals, without privity of estate: in other different per-
 words, the same hereditament cannot be the subject of two sons without
 interests, each relating to the same period, and each com- privity of
 prising the entire legal seisin, property, or ownership for that estate.
 period. There can be but one legal seisin, property, or own-
 ership, whether occupying, as it were, the whole period of
 the duration of real hereditaments, or only a given part
 thereof; though that, as we have seen, may indeed be
 divided into several contemporaneous shares, or several suc- [19]
 cessive parts. When once it has attached in any person,
 another person who is not privy in estate, as coparcener,
 joint-tenant, tenant in common, or tenant by entirety, can
 have, during the same period, only the equitable or bene-
 ficial interest, property, or ownership, with or without the
 possession; or nothing but a right or interest of an imper-
 fect character and merely collateral to the legal seisin, pro-
 perty, or ownership; whether it be an executory interest;
 or an interest for a term of years, conferring the possession
 for a limited period, with or without the beneficial interest
 for that period; or a *quasi* interest; or a mere precarious
 possession; or a power of appointment, a charge, or a
 lien.

55 Thus, if land is limited to the use of *A.*, for life; Illustration
 remainder to the use of *B.*, in tail; remainder to of the two
 the use of *C.*, *D.*, and *E.*, as tenants in common in fee; in preceding
 this case, *A.* has one part of the legal seisin, property, or observations.
 ownership; *B.*, another; and *C.*, *D.*, and *E.*, the remaining

part. And these three successive estates being commensurate with the duration of the land itself, and filling up the whole measure of the legal seisin, property, or ownership which may be had therein; every other interest in the land must be only the equitable or beneficial interest, property, or ownership, with or without the possession; or nothing but an imperfect right or interest merely collateral to the legal seisin, property, or ownership.

The equitable ownership and the possession are of similar duration.

XI. In a similar way, the mere equitable or beneficial interest or ownership, and the mere right—56
 full unlimited possession, being co-extensive with the duration of the hereditaments themselves, and therefore of unlimited duration, may be divided into an indefinite number of constituent periods or portions.

Equitable ownership cannot reside in two different persons without privity of estate.

XII. But the equitable or beneficial interest, property, or ownership, like the legal seisin, property, or ownership, cannot reside in two different individuals without privity or estate. When once it has attached in any person, another person who is not privy in estate, as co-parcener, joint-tenant, tenant in common, or tenant by entirety, can have, during the same period which it occupies or to which it relates, the mere legal seisin, property, or ownership, with or without the possession, or nothing but an imperfect right or interest merely collateral to the legal and equitable ownership or property, such as those enumerated above, and defined in the next section.

[20]

Into what portions seisin, property, or ownership is divisible.

XIII. The seisin, property, or ownership of or 58
 in lands or tenements can only be divided into periods or portions of the measure of freehold; that is, into estates for life, and estates of inheritance. Any periods or portions of interest which are less than these in the eye of the law, do not constitute portions of the seisin, property, or ownership, but merely confer a right to the temporary possession or enjoyment, or both.

But the property or ownership of or in personal estate may be divided into any kind of periods or portions.

Legal ownership or freehold and inheritance cannot be in abeyance.

XIV. As the legal seisin, property, or ownership, or, in other words, the legal freehold and inheritance, is commensurate with the duration of real hereditaments, it must be in existence at all times, either in some particular person and persons, or at least in contemplation of law. But, in fact, it cannot be in existence merely in contemplation of law: it can never be in abeyance, but must reside in some person, in order that there may always be some one in *esse*, against whom an action may be brought for the recovery of the land. And therefore, if a person limits a freehold interest in the land, by 60
 way of use or devise, which he may do, though he could not do so at the common law, to commence *in futuro*,

Consequences of this doctrine. See § 117—127a.

without making any disposition of the intermediate legal seisin, property, or ownership, (b) or a disposition of it which does not exhaust the whole of such intermediate legal seisin, property, or ownership; the legal seisin, property, or ownership, except such part thereof, if any, as is comprised within a prior disposition of a vested interest, of course remains in the grantor and his heirs, or the heir at law of the testator, until the arrival of the period when, according to the terms of the future limitation, it is appointed to reside in the person to whom such interest *in futuro* is limited.

61 (c) And if a person limits the inheritance, whether at common law or by way of use or devise, to arise on a contingency, by way of remainder immediately after the regular expiration of prior estates, of course the inheritance, until the happening of the contingency, remains in the grantor and his heirs, or the heir of the testator.

62 (d) And hence, in each of these cases, during the intervening period, no other person but the grantor and his heirs, or the heirs of the testator, can have any thing more than a mere right or interest, existing collaterally to the legal seisin, property, or ownership, though capable of attracting and becoming converted into the legal seisin, property, or ownership, in the event or at the time specified. See § 54.

Passing from these general introductory observations, an attempt will now be made to distribute the various interests in property, into classes, and accurately, and as concisely as consistent with real utility, to define and distinguish them.

SECTION THE SECOND.

The different classes of Interests, in the widest sense of the term, defined, and distinguished.

63 We have seen that an interest in any subject of property, in the widest or popular generic sense of the word, is that connexion which subsists between a person and such subject of property. (See § 44, 65, 84.)

64 The various interests in the widest sense of the term.

term, which may be had in lands or tenements, and which are connected with the science of conveyancing, may be divided into—

Division of interests, in the widest

(b) *Sir Edward Clere's Case*, 6 Co. Rep. 17 b, as stated, Fearn, 351.

(c) See Fearn, 1, note (a).

(d) *Davies v. Speed*, Carth. 262; *Plunket v. Holmes*, Raym. 28; *Purefoy v. Rogers*, 2 Sand. 380; *Carter v. Barnadiston*, 2 Bro. Cas. Parl. 1; and *Lodgington v. Kime*, 1 Salk. 224; as cited Fearn, 353—356. And Fearn, 360—364.

sense of the
term, in lands

[22]

ornements.

- I. Legal interests of the measure of freehold.
- II. Legal interests for a term of years.
- III. Equitable interests of the measure of freehold.
- IV. Equitable interests for a term of years.
- V. *Quasi* interests.
- VI. Mere precarious possessions.
- VII. Expectancies.
- VIII. Powers of appointment.
- IX. Charges.
- X. Liens.

Definition of I. A legal interest of the measure of freehold is 65
a legal free- a right constituting the object of a limitation where-
hold interest. by a grant or devise is made, and extending to the legal
See § 63, 84. seisin, property, or ownership of the land. Interests of this
kind are said to be legal estates or interests in the land, in
the technical generic sense of the phrase.

Definition of II. A legal interest for a term of years is a right 66
a legal inter- constituting the object of a limitation, and extend-
est for a term ing only to the actual possession, either with or without the
of years. beneficial enjoyment, for a certain number of years.

Definition of III. An equitable interest is a right constituting 67
an equitable the object of a limitation, and extending merely to
freehold in- the beneficial enjoyment for a period of the measure of free-
terest. hold, in contradistinction as well to the legal seisin, property,
See § 63, 65, or ownership, as to the actual possession. Interests of this
84. kind are said to be equitable estates or interests in the land,
in the technical generic sense of the phrase.

Definition of IV. An equitable interest for a term of years is 68
an equitable a right constituting the object of a limitation, and
interest for a extending merely to the beneficial enjoyment for a certain
term of years. number of years.

Definition of V. What, for the sake of convenience, is above 69
a quasi in- termed a *quasi* interest, is a power or possibility
terest. of gaining the property or ownership of the land, which,
though not constituting the object of a limitation, is yet
founded in an actual provision, or on a lost but recoverable
seisin.

Of this nature are—

The different 1. Present rights of entry or action for conditions broken,
species of and present rights of action for the recovery of an estate.
quasi inte- 2. Mere possibilities, in the technical and specific sense,
rests. such as—

[23]

- (1) A ^a possibility of reverter on a grant of a quali-
fied or determinable fee. (a)
- (2) A ^b possibility of reverter on a grant of an estate

(a) See Fearn, 861, note (a), 1.

for life in a term, where there is no limitation over.(b)

- (3) A 'contingent right of entry, in case there should be a breach of a condition subsequent(c); or a 'future right of a wife to enter after her husband's death.(d)

70 VI. The nature of a mere precarious possession is Mere pre-
sufficiently obvious from the term itself. Such a vicious pos-
session may exist— sessions.

1. With the right of possession;

(1) With consent of the proprietor, as in tenancies at will.

(2) 'Adverse, as in the case of a disseisor, where the disseisee's right of possession is taken away.(e)

2. Without the right of possession;

(1) With consent of the proprietor, as in the case of tenancy by sufferance.

(2) 'Adverse, as in the case of a disseisor, where the disseisee's right of possession is not taken away.(e)

71 VII. An expectancy or chance is a mere hope, Definition of
unfounded in any limitation, provision, trust, or an expect-
legal act whatever; such as 'the hope which an heir appa-
rent has of succeeding to the ancestor's estate.(f) This is
sometimes said to be a 'bare or mere possibility,(g) and, 'at
other times, less than a possibility.(h) It is a possibility in
the popular sense of the term. But it is less than a possibi-
lity in the specific sense of the term possibility. For, it is
no right at all, in contemplation of law, even by possibility;
because, in the case of a mere expectancy, nothing has been
done to create an obligation in any event; and 'where there
is no obligation, there can be no right; for right and obliga-
tion are correlative terms.(i)

[24]

72 VIII. Powers of appointment of real property Definition of
are powers of creating an interest in the same by a power of
appointing it to certain uses. appointment.

73 IX. Charges on real estate are sums of money Definition of
payable out of the same. a charge.

74 X. A lien is a hold upon property, for the satis- Definition of
faction of a claim attaching thereto, under an ex- a lien.

(b) Fearn, 486.

(c) See Fearn, 381, note (a), 1.

(d) Fearn, 289.

(e) See Fearn, 286, note (e). 2 Bl. Com. c. 13. Burton's Compendium, I. 6.

(f) *Carleton v. Leighton*, 3 Meriv. 671.

(g) Fearn, 370-1.

(h) Fearn, 551.

(i) Paley's Moral and Polit. Phil. B. II. c. x.

press charge or contract, or a constructive trust. Thus, judgments, statutes, and recognizances do not create any right in the land, but only a lien on the land, which may or may not be enforced upon it.^(k)

Interests, in the widest sense of the term, in personal property.

In regard to personal property, it will be sufficient generally to observe, that subject to the well-known distinctions between real and personal estate, the various interests which may be had in personal property are susceptible of a similar division, and of similar definitions.

74a

SECTION THE THIRD.

The different kinds of Interests of the measure of Freehold in Lands and Tenements, and Interests in Chattels, analytically arranged, defined, and distinguished.

I. Division of freehold interests with reference to the existence &c. of the seisin, pro-
[25]
perty, or ownership.

I. INTERESTS of freehold duration in lands and tenements, and interests in chattels, when considered with regard to their existence or non-existence, or acquisition or non-acquisition, and the certainty or uncertainty, of the seisin, property, or ownership, and the presence or expectation of the possession or enjoyment, and the circumstances in which such expectation is founded, may be divided^(a) into—

75

I. Vested interests, or actual estates.

1. Present vested interests.

(1) Vested in possession, or enjoyment, or in both.

(2) Vested in interest or right.

(a) A right of immediate entry to regain the possession.

(b) A present vested interest in real estate, subject to a term for years.

(c) A present vested interest, subject to a chattel interest of uncertain duration.

(d) A present vested interest, subject to a suspension of the possession, or enjoyment, or both.

2. Future vested interests.

(1) Vested remainders.

(2) Vested *quasi* remainders.

(3) Reversions.

II. Executory interests, or interests in the technical specific sense, as contradistinguished from actual estates.

1. Certain executory interests.

(1) Springing interests ;

(k) Story's Eq. Jur. § 416.

(a) On this point see Fearn, 1, and note(a).

- (2) Interests under augmentative limitations.
- (3) Interests under diminuent limitations; and
- (4) Interests under conditional limitations;—where such interests are to take effect on an event or at a time certain.

2. Contingent executory interests.

- (1) Springing interests;
- (2) Interests under augmentative limitations;
- (3) Interests under diminuent limitations;
- (4) Interests under conditional limitations;—where such interests are to take effect on an event or at a time certain.
- (5) Alternative interests.
- (6) Interests under contingent limitations of the whole, or the immediate part, of a reversion.
- (7) Contingent remainders.
- (8) Contingent *quasi* remainders.

75a Vested and executory interests may be defined [26] either—

- 1. With reference to the right of actual possession or enjoyment.
- 2. Without reference to the right of actual possession or enjoyment.

Two modes of defining vested and executory interests.

76 1. A VESTED INTEREST or an actual ESTATE properly so called, (b) if defined with reference to the right of possession or enjoyment, is that kind of present right of present or future possession or enjoyment, which is actually clothed with the seisin, property, or ownership. And a PRESENT vested interest is a right of present possession or enjoyment, or both; or, a present right of having the possession or enjoyment, or both, at a future time to which there is mere postponement of the possession or enjoyment, or both, either in favour of a prior chattel interest of uncertain duration, or in the absence of a prior chattel interest, and not a postponement of the seisin, property, or ownership; or, in the case of real estate, a present right of having the possession or enjoyment, or both, whenever there may be a vacancy thereof by the determination of a preceding term for years. Where as a FUTURE vested interest is a present right of having the possession or enjoyment whenever it may become vacant, in the case of real estate, by the determination of a preceding freehold estate, or, in the case of personal estate, by the determination of a preceding chattel interest.

1. Definition of vested and executory interests, with reference to the right of possession or enjoyment. — of a vested interest, or actual estate. — of a present vested interest.

77 which is actually clothed with the seisin, property, or ownership. And a PRESENT vested interest is a right of present possession or enjoyment, or both; or, a present right of having the possession or enjoyment, or both, at a future time to which there is mere postponement of the possession or enjoyment, or both, either in favour of a prior chattel interest of uncertain duration, or in the absence of a prior chattel interest, and not a postponement of the seisin, property, or ownership; or, in the case of real estate, a present right of having the possession or enjoyment, or both, whenever there may be a vacancy thereof by the determination of a preceding term for years. Where as a FUTURE vested interest is a present right of having the possession or enjoyment whenever it may become vacant, in the case of real estate, by the determination of a preceding freehold estate, or, in the case of personal estate, by the determination of a preceding chattel interest.

— of a future

(b) See Fearn, 1, notes (a) and (b). It is very common, and not inaccurate, to speak of an executory or a contingent estate. But when the word estate is opposed, as it frequently is, to the word interest, then it signifies a vested and not a contingent or executory interest.

Remarks on the distinction between a present and a future vested interest. It must be observed, that a vested interest is present or future, solely with reference to the seisin, property, or ownership, and not with reference to the possession or enjoyment, or both. If the interest comprises the immediate portion of the seisin, property, or ownership, it is a present vested interest, even though the possession, or enjoyment, or both, be postponed to a future time. And hence a vested interest, in real estate, which is limited to take effect after the regular expiration of a term for years, is a present vested interest; because, inasmuch as a term for years does not extend to the seisin, property, or ownership, of lands or tenements, there is a mere postponement of the possession, or enjoyment, or both, during the term, and not a postponement of the seisin, property, or ownership. But a like interest in personal estate is a future vested interest; because, when an interest for years is created out of a term or other personal estate, it does carry a part of the property or ownership in such term or other personal estate.

[27] See § 58. When the right is a right of present possession, and the party is in possession, whether personally or by substitute, the estate is said to be vested in possession. When it is a present right of having the possession whenever it may become vacant by the determination of a preceding chattel interest, or whenever it may become vacant by the determination of a preceding freehold estate, or at some other future time to which only the possession is postponed; in each of these cases, the estate is said to be vested in right or interest. And even when it is a present right of present possession, if such right has been attended with the possession, but ceases to be so, the estate can only be said to be vested in right or interest.

When an estate is vested in possession. See § 49. Sometimes the word vested is used, not in the strict and technical sense, but to express a vesting *sub modo*, an attaching inchoately or inceptively; as, where an interest is said to vest in certain persons before the death of the testator, (c) in which case it is meant to signify that the interest has so far attached in the party, that if the testator were to die immediately, it would be completely vested in the party, instead of being dependent on some subsequent contingency, such as that of birth or survivorship. And so where an interest is said to be vested in a person so far as to be transmissible to his representatives. (d)

When an estate is vested in right or interest. Vesting inchoately or inceptively. Definition. An EXECUTORIAL INTEREST, or an interest in the narrowest and technical specific sense of the word

(c) Fearne's statement of the case of *Hopkins v. Hopkins*, 525.

(d) See the remarks of Lord Thurlow, C., in *Burnes v. Allen*, 1 B. C. C. 181, cited 1 Rep. Leg. by White, 513.

interest, is a present or contingent right of present or future possession or enjoyment, or both, constituting the object of a limitation whereby a grant, devise, or bequest, is made, and not yet clothed with the seisin, property, or ownership, but destined to be clothed therewith in a certain or contingent event. In this sense, the word interest is frequently used in contradistinction to an estate.

85 A CERTAIN EXECUTORY INTEREST is a present right of having the possession or enjoyment, or both, at a future period, which is sure to arrive, and irrespective of the regular expiration of any other interest.

86 A CONTINGENT EXECUTORY INTEREST is a contingent right of having the possession or enjoyment, or both, in some uncertain event.

87 2. A VESTED INTEREST or an actual estate, *if defined without reference to the right of possession or enjoyment*, is the seisin, property, or ownership, or a portion thereof, which in the case of real estate is of the measure of freehold, actually acquired by and residing in the person who is said to have an estate or vested interest.

88 And a PRESENT VESTED INTEREST is the entire seisin, property, or ownership, of which any subject of property is susceptible, or the immediate portion thereof, which, in the case of real estate is of the measure of freehold, actually acquired by and residing in the person who is said to have such present vested interest.

89 Whereas, a FUTURE VESTED INTEREST IN LANDS OR TENEMENTS, is a portion of the seisin, property, or ownership, of the measure of freehold, next after a preceding freehold estate, and actually acquired by and residing in the person who is said to have such future vested interest.

89a A FUTURE VESTED INTEREST IN CHATELS is a portion of the property or ownership, next after a preceding vested interest, and actually acquired by and residing in the person who is said to have such future vested interest.

90 AN EXECUTORY INTEREST is the seisin, property, or ownership, or a portion thereof, of the measure of freehold, not yet acquired by the person who is said to have such executory interest, but appointed by the terms of a grant or devise to be acquired by and to reside in him in a certain or contingent event. And when such event is certain, the interest is a CERTAIN EXECUTORY INTEREST when the event is contingent, the interest is a CONTINGENT EXECUTORY INTEREST.

91 *Vested and executory interests have been de-

tingent executory interest.

executory interests are most correctly defined *without reference to the right of possession or enjoyment.*

See § 50.

See § 87-90.

The several kinds of certain and contingent executory interests.

See § 117.

See § 128, 159.

See § 137, 147, 149, 169.

See § 137.

finer by the great authority upon the subject, *with reference to the right of possession or enjoyment.*(e) This is convenient in some respects. But, it must be observed, that a vested interest may frequently be unattended with the right of possession or enjoyment; since that right may reside in some other person than the individual having such vested interest. And hence, as the right of possession or enjoyment is only a separable incident, perhaps it is not strictly correct to make it the basis of a definition of a vested interest. Such interests, therefore, may perhaps be more scientifically and accurately defined *without reference to the right of possession or enjoyment*, as in the definitions lastly above given.

Definitions of the several kinds of certain and contingent executory interests, are embodied in, or may be immediately formed from, the definitions of the limitations creating such interests, as given in the next chapter. Thus, a limitation of a springing interest is there defined to be, a limitation which creates an interest, by way of use or devise, to take effect &c., from which the reader will perceive, that a springing interest is an interest, by way of use or devise, to take effect &c.: And so with alternative interests and interests in remainder. And interests under augmentative, deminuent, and conditional limitations, and interests under limitations of the whole or the immediate part of a reversion, may of course be defined by means of the definitions of such limitations. Thus, an interest under an augmentative limitation, is an interest under a limitation by deed at common law, under which &c. It was considered highly desirable to give distinct definitions of the several limitations; and it appeared that this general direction would render it unnecessary to give separate definitions also of the interests created by such limitations.

[30]

II. Division of contingent interests with reference to the nature of the contingency.

II. Looking to the nature of the contingency, contingent interests may be further divided into— 93

1. Those which are contingent on account of the person.
2. Those which are not contingent on account of the person.
3. Those which are contingent both on account of the person, and also on account of some other contingency.

Definition of an interest which is contingent on account of the person.

An interest which is contingent on account of the person, is one which is contingent by reason of being limited to a person who is unborn or not yet ascertained; or limited to a person when he shall sustain a particular character, arrive at a given age, or fulfil a certain condition. 94

95 III. Contingent interests are also susceptible of further division in regard to their capacity of transmission. But this will form the subject of a distinct chapter. (See § 742-8.)

III. Division of contingent interests with reference to transmission.

96 IV. With reference to the certainty of their duration, interests are divided into—
1. Defeasible.
2. Indefeasible, or absolute.

IV. Division of interests with reference to certainty of duration.

97 A **DEFEASIBLE** interest is an interest that is subject to be defeated by the operation of a subsequent or mixed condition, or by the exercise of a power. (See § 12, 15—19, 14, 20.)

Definition of a defeasible interest.

98 An **INDEFEASIBLE** interest, or an absolute interest as opposed to a defeasible interest, is one that is not subject to any condition now liable to be defeated by the exercise of a power.

— of an indefeasible or absolute interest.

99 V. With reference to the quantity of interest, they are divided into—
1. Absolute,
2. Limited.

V. Division with reference to quantity of interest.

100 THE **ABSOLUTE** interest, as opposed to a limited interest, is an interest which comprises the entire ownership of which the entirety, or some portion of the entirety, of any hereditament, is susceptible.

Definition of the absolute interest.

101 A **LIMITED** interest is one which does not comprise that entire ownership. When the term "absolute" is used in this sense, the definite article "the" is

[31]
— of a limited interest.

usually prefixed to it, as above, in order to distinguish it from "an absolute interest" in the sense of an indefeasible interest. But the term "an absolute interest" is sometimes, though not often, used even in opposition to the term "limited interest."

The distinction between the absolute interest and an absolute interest.

104 These definitions equally apply whether the interests are legal or equitable, in real or in personal estate, according to the nature of the ownership or property which they respectively constitute: the word property or "ownership," in the case of a legal interest, referring of course to the legal ownership; and the same word, in the case of an equitable interest, referring to the equitable or beneficial ownership.

Foregoing definitions applicable to legal and equitable interests, and to real and personal estate.

CHAPTER THE FOURTH.

REMAINDERS IN GENERAL, AND THE OTHER KINDS OF LIMITATIONS, IN THE DERIVATIVE SENSE, ANALYTICALLY ARRANGED, DEFINED, AND DISTINGUISHED.

- Two senses of the word limitation. We have seen in a preceding page, that the word limitation is used in two senses, which, for convenience, are there respectively designated "the original sense" and the "derivative sense." 105
- Definition of a limitation. Limitations in the derivative sense, that is, entire sentences "creating, (a) and actually or constructively marking out the quantity of an estate, are those which form the subject of the present chapter. 196
- See § 28—33.

SECTION THE FIRST.

Division of Limitations into Simple and Qualified, with definitions of those terms.

- Division of such limitations into simple and qualified. IN regard to the manner in which the estate created is founded, such limitations may be divided into— 107

I. Simple or absolute limitations. (b)

II. Qualified limitations.

1. Directly qualified.

2. Indirectly qualified.

- Definition of a simple or absolute limitation. What is here termed a SIMPLE OR ABSOLUTE LIMITATION, is a sentence creating an estate with only a general limitation (in the original sense,) or limit. 108

- Definition of a qualified limitation. On the other hand, what is here termed a QUALIFIED LIMITATION, is a sentence creating an estate with a special or collateral limitation (in the original sense,) or limit. (See § 26, 28, 34.) 109

- Distinction between directly qualified and indirectly qualified. Qualified limitations may be subdivided into directly qualified and indirectly qualified, according as the special limitation or limit is direct or indirect. (See § 41—2.) 110

[33]

rectly qualified limitations.

SECTION THE SECOND.

Division of Limitations into Immediate and Executory, with Definitions of those terms, and Observations thereon.

- Division of limitations into immediate and executory. LIMITATIONS, or the gifts made by them, when considered with reference to their conferring, or not conferring, vested interests, are termed either, 111

(a) See Prest. Shep. T. 117.

(b) Fearn, 10, note (h), fifth paragraph.

I. Immediate grants, devises, bequests, or limitations; meaning thereby, limitations or gifts of vested interests, whether present or future; or See § 75.

II. Executory grants, devises, bequests, or limitations; meaning thereby, limitations, or gifts of executory interests, whether certain or contingent. (c) See § 75.

111a The term "executory devise" would have been most properly used as above, in the generic sense, in contradistinction to an immediate devise, so as to include contingent remainders, as well as other "future interests limited to arise and vest upon some future contingency;" (d) so as to comprise, in fact, all limitations of executory interests by way of devise. But the term is almost invariably used in a narrower sense, in contradistinction as well to contingent remainders, as to immediate devises, so as to denote "such a limitation of a future estate or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law," (e) or, in other words, to denote limitations of springing interests, limitations of interests by way of conditional limitation, and *quasi* remainders after a life interest in personal estate; as distinguished from those limitations of future interests which were good limitations at common law; namely, limitations by way of remainder, limitations of the whole or the immediate part of a reversion, augmentative limitations, and diminuent limitations. An alternative limitation, though always an executory devise in the generic sense of the term, as opposed to an immediate devise, is not always an executory devise in the specific and usual sense, in contradistinction to contingent remainders; for many alternative limitations are contingent remainders in relation to the particular estate. The generic term "executory devise" is commonly used instead of specific terms. See § 84, 90. The specific sense of the term. See § 117, 148-9, 169. See § 159, 169b. See § 137, 147, 138. [34]

111b Limitations of springing interests, conditional limitations, *quasi* remainders after a life interest in personal estate, and alternative limitations, when contained in wills, are seldom distinguished or designated by these or any other specific terms, but are usually denoted by the general term of executory devises. The generic term "executory devise" is commonly used instead of specific terms.

111c It has, doubtless, been found convenient to use this general term, and other general terms, instead of more specific terms—convenient, that is, in one respect; namely, because the learning of executory interests, as a *science*, may perhaps be truly said to have been hitherto in This has generally arisen from the imperfect state of the

(c) See Fearné 1, note (a).

(d) See the definition quoted; Fearné, 361.

(e) Fearné, 366. Rents, offices, and dignities, not previously subsisting, might be limited to commence in *future*, even at common law. Fearné, 528, 529.

science, and its infancy. Cases, indeed, in abundance upon this branch of law, have been brought before the Courts and decided, and with few exceptions, rightly decided; and these decisions have equally illustrated the immense value of the practice of hearing counsel on both sides, and the sound judgment and strict integrity of those learned men whose duty it has been to decide between the opposite lines of argument.

But, at the same time, the arguments of counsel, the dicta of the judges, and the propositions in the books; and above all, and as the inevitable result of these arguments, dicta, and propositions, the reiterated call for fresh judicial decisions upon points which other cases had previously and satisfactorily decided; not unfrequently evince the want of a correct and perspicuous analytical arrangement of the different kinds of interests, and the various sorts of conditions and limitations on which they depend, or by which they are created or affected; as well as the want of just and precise definitions, including all that ought to be included, and excluding every thing else; and the non-existence, in many instances, of accurate and well-defined distinctions, embodied in rules and propositions, and explained and commended by the expression of the grounds and reasons on which they rest. Such having been the state of this branch of the law, it is not surprising that general rather than specific terms have commonly been used. In fact, it was an almost necessary result of the imperfect state of this branch of legal learning, as a science, either as it existed in the mind of the speaker or writer on the one hand, or in the mind of the hearer or reader on the other hand. And, in many cases, indeed, it has been as well to use a general designation as to use a specific term: and of course, in some instances, where the object is to generalise, and generalisation can be accomplished with accuracy, the general designation is the most appropriate. But, in the great majority of cases, the maxim, *error latet in generalibus*, was peculiarly applicable; and the use of general designations, instead of specific terms, has been the source of passages in the books; which, embracing distinct and dissimilar cases, greatly tend to mislead; of vague, confused, and erroneous conceptions in the student; of perplexity and mistake in the practitioner, and sometimes even in the judges themselves; and of constant litigation upon points which would or might otherwise have been long before set at rest.

For this reason, specific terms are used in the present essay, rather

In the present *attempt*, therefore, to give an accurate, well-defined, and perspicuous view of the various kinds of future interests, the author has almost always employed a specific term, in preference to a general designation; and in fact, 'contrary to the course hitherto pursued, (f) has ex-

(f) See Fearn, 415.

hibited and treated of the various conditions, limitations, than general and interests, with especial "regard (to use the language of terms; and Fearne) to their specific distinctions and relations." (f) the specific distinctions and relations of and between the various conditions, limitations, and interests, are pointed out. [36]

This, the author humbly submits, is the only way of endeavouring, with any prospect of success, to mould the subject into a more correct, determinate, and scientific form, so as to rescue it from that state of distressing uncertainty, discrepancy, and confusion, in which many points in reality, though not apparently to the superficial observer, were left, even after the publication of the justly celebrated Treatise of Fearne; and in which state, many more points exist at the present day, after the long interval that has elapsed since the death of that illustrious man.

SECTION THE THIRD.

Of Limitations of Vested Interests, when considered with reference simply to the possession or enjoyment, or both.

111d I. *Of limitations of interests vested in possession, or in enjoyment, or in both.*

THESE are limitations which confer a right to the immediate possession, or enjoyment, or both, as well as the immediate portion of the seisin, property, or ownership of and in real or personal estate.

111e II. *Of limitations of vested interests in real estate, - subject to a term for years.*

These are limitations which merely suspend the possession or enjoyment, or the possession and enjoyment, of real estate, till the certain regular expiration of a term for years, without suspending the seisin, property, or ownership of and in such real estate. See § 245—257, 124a.

111f III. *Of limitations of vested interests, subject to a chattel interest of uncertain duration.* See Part II. c. VIII.

These are limitations which merely suspend the possession or enjoyment, or the possession and enjoyment, of real or personal estate, till the determination of a prior chattel interest of uncertain duration, without suspending the seisin, property, or ownership of and in such real or personal estate.

111g IV. *Of other limitations of vested interests, subject to a suspension of the possession or enjoyment, or both.* See Part II. c. VIII.

These are limitations which merely suspend the possession or enjoyment, or the possession and enjoyment, of the real or personal estate, till a future time other than that of

the determination of a prior interest, without suspending the seisin, property, or ownership of and in such real or personal estate: as if real or personal estate be devised or bequeathed to a person; with a direction that he shall take a vested interest, but that he shall not be put into possession till he shall attain his majority.

SECTION THE FOURTH.

A Fourth Division of Limitations into those forming the subject of the following sections.

With reference to the existence or non-existence, 112
certainty or uncertainty, of the possession or enjoyment by virtue of the interests which they create, as well as to the various modes in which they are constructed, limitations may also be divided into,

See § 75a,
77, 78a, 88.

See § 113.

See § 114.

See § 115.

I. Limitations constituting grants, devises, or bequests, *in presentis*, or limitations of present vested interests.

1. Absolute.

2. Hypothetical.

3. In default of appointment.

II. Limitations constituting grants, devises, or bequests, *in futuro*.

See § 78, 88.

§ 159, 171.

See § 168.

See § 169.

See § 85, 90.

§ 117, 127b.

See § 137.

See § 147.

See § 148-9.

1. Limitations creating future vested interests.

(1) Limitations by way of vested remainder.

(2) Limitations by way of vested *quasi* remainder.

(3) Limitations of vested interests in the whole, or in the immediate part, of a reversion.

2. Limitations creating certain executory interests.

(1) Limitations of springing interests;

(2) Augmentative limitations;

(3) Diminuent limitations; and

(4) Conditional limitations;

—where such limitations are to take effect on an event or at a time certain.

3. Limitations creating contingent executory interests.

(1) Limitations of springing interests;

(2) Augmentative limitations;

(3) Diminuent limitations; and

(4) Conditional limitations;

—where such limitations are to take effect on an event or at a time which is uncertain.

See § 86, 90.

§ 117, 127b.

See § 137.

See § 147.

See § 148-9.

§ 159, 172.

See § 168.

See § 169.

See § 128.

See § 116.

(5) Limitations by way of contingent remainder.

(6) Limitations by way of contingent *quasi* remainder.

(7) Limitations of contingent interests in the whole or the immediate part, of a reversion.

(8) Alternative limitations.

(9) Clauses creating powers of appointment.

SECTION THE FIFTH.

Of Limitations of Present Vested Interests, when considered with reference to the modes in which they are constructed. See Sect. III.

113 I. *Of absolute limitations.*

AN absolute limitation is a sentence by which an estate is created so as not to be dependent on any condition whatever.

114 II. *Of *hypothetical limitations.*

What is here termed an hypothetical limitation, is a sentence which creates an estate in an event or on a condition fulfilled or decided at or before the delivery of the deed, or to be fulfilled or decided at or before the death of the testator. (g)

115 III. *Of limitations in default of appointment.*

A limitation in default of appointment, is a sentence in which an estate is limited to a person, in case of the non-exercise of a power of appointment; and the effect of which is, to create a vested interest, subject to be defeated by the exercise of the power.

SECTION THE SIXTH.

[39]

*Of Limitations IN FUTURO: and first,
Of clauses creating powers of appointment.*

116 These are clauses by which land is limited to uses to be appointed by a particular person, either in the absence, or in defeasance, postponement, or modification of uses previously limited by the instrument creating the power.

SECTION THE SEVENTH.

Of Limitations of Springing Interests.

117 A LIMITATION of a springing interest in real estate, is a sentence which creates an interest, by a limitation way of use or devise, to take effect at a future time, without being supported by, and without affecting any other interest of the measure of freehold. Definition of
ing interest
in real prop-
erty.

* For the sake of convenience, perspicuity, and exactness, the author has reluctantly been obliged to make use of this and one or two other new specific terms, where there has been no term in common use except the generic term.

(g) Fearn, 458, note (d).

Division of Limitations of this description may be distributed 118
such limita- into seven kinds;

tions into I. The first is a sentence which creates an inter- 119
seven kinds. est in favour of a person unborn or unascertained,
Definition of or an interest which is limited to take effect at a future time,
the first kind. without being preceded by any other, or ¹merely preceded
by a term for years which is to commence at a future time. (h)
As ¹in the case of a devise to take effect six months after
the testator's death; or a devise to the first son of J. S.,
when he shall have one, or the heir of J. S., a person who
is living. (i)

Gardner v. Lyddon, 8. An instance of this kind of springing interest occurred
where a testator gave to two persons and their heirs, to sell
You. and Jer. and dispose, at their discretion, one quarter part of all his
[40] right in Moorlinch, if an act should pass for inclosing the
389. See said moor within 20 years. And he directed the moneys to
also *Wood-* arise by such sale, to be divided between certain persons
liff v. Drury, whom he named. It was held that this was an executory
Cro. Eliz. devise to take effect after an inclosure act.
439, as sta-
ted, *Fearne*, 275.

Definition of II. The second is a sentence which creates a 120
the second freehold interest to take effect on the regular cer-
kind. tain expiration of a chattel interest, but such freehold inter-
est is contingent on account of the person. As where a
See § 124a. testator devises to A. for 21 years, and then to the first un-
born son of B. in fee.

Definition of III. The third is a sentence which creates a free- 121
the third hold interest which is to take effect after a preced-
kind. ing chattel interest, but only on a contingent determination
See § 34- of such chattel interest by force of a special or collateral
42, 124a. limitation. As if land is devised to A. for 21 years, if B.
shall so long remain at Rome; and if he quit Rome during
the term, to C. in fee. Or, where land is devised to A. for
21 years, if he shall so long live; and on the death of A.,
then to B. in fee.

Danger of There is a danger of ¹confounding the kind of 122
confounding springing interest exhibited in the first of these ex-
the second, amples, with a contingent remainder of the first class here-
third, and after mentioned. (k) Such a limitation might indeed be
fourth kinds termed a remainder, as regards the possession, or the enjoy-

(h) *Pay's Case*, Cro. Eliz. 878, as stated, *Fearne*, 400, 539.

(i) See *Fearne*, 395; and *Gore v. Gore*, 2 P. W. 28, as there stated. See also *Fearne*, 400.

(k) The learned Editor of the former editions of *Fearne* appears to have fallen into this error. (See *Fearne*, 5, note (d), fifth paragraph.) And yet he agrees with *Fearne* in stating, that a contingent remainder requires a preceding freehold to support it.

ment, or both. But it is not a remainder, in relation to the of limitations
seisin, property, or ownership, and therefore not a remainder of springing
properly so called. interests with
contingent remainders.

And the same danger exists, in fact, of confounding other See § 159,
instances of the second, third, and fourth kinds of limitations 162.
of springing interests with contingent remainders.

123 IV. The fourth is a sentence which creates a Definition of
freehold interest after a preceding term for years, the fourth
to take effect, in right, on an event or at a time uncon- [41]
nected with the original measure and the regular expiration kind.
of the term. As where land is devised to *A.* for 21 years; See § 124a.
and if *A.* shall die within the term, then, on the expiration
of the term, to *B.* in fee.

124 V. The fifth is a sentence which creates a free- Definition of
hold interest after a preceding term for years, to the fifth
take effect, in possession, or enjoyment, or in both, in de- kind.
feasance of the term, or of the beneficial interest therein, on See § 124a.
an event or at a time which may happen within the term,
but is unconnected with the original measure and the regu-
lar expiration of the term. As where land is devised to *A.*
for 21 years; and on the death of *A.*, then immediately to
B. in fee.

This, though a conditional limitation, specifically so called, See § 148, 9.
as regards the possession, or enjoyment, or both; is a limita-
tion of a springing interest, as regards the seisin, property, See § 117,
or ownership; and therefore most properly classed among 152.
those springing interests which do not affect a prior free-
hold.

124a From the second, third, fourth, and fifth kinds Limitations
of springing interests, we must be careful to dis- of vested in-
tinguish limitations of vested interests, subject to a term or terests, sub-
other chattel interest, or, in other words, limitations of a free- ject to a
hold interest in favour of a person in being and ascertained, chattel inter-
to take effect in possession, or enjoyment, or both, on the est, must be
regular and certain expiration of an actually subsisting term distinguished
or other chattel interest, and without requiring the concu- from the
rence of any collateral contingency. And from the first second, third,
kind, we must distinguish other limitations of vested inte- fourth, and
rests, subject to a suspension of the possession, or enjoy- fifth kinds of
ment, or both. limitations of
springing in-

interests. See § 111e-111g, 248-254.

125 VI. The sixth is a sentence which creates an Definition of
interest to take effect at a time which could not the sixth
arrive till a period subsequent to the expiration of a preced- kind.
ing interest created by the same instrument, or which might
not arrive till a period subsequent to the expiration of an in-
terest created by a prior instrument. (See § 379.) As

where a devise is made to *A.* for life, remainder, after the death of *A.* and one day afterwards, to *B.* for life. (*l*)

[42] VII. The seventh is a sentence which creates an 126

Definition of interest to take effect on the regular expiration of the seventh a qualified fee which must expire, if at all, within the period kind. prescribed by the rule against perpetuities. As "where land is limited by way of use or devise, to *A.* and his heirs, till *B.* shall &c.; and then to *B.* and his heirs. (*m*)

Observation "There is no clearer rule in law" (says Lord 127
of Lord Not- Nottingham) "than this, that there can be no re-
mainder limited upon an estate in fee; yet public reason

and the convenience of common assurances have found a way to pass by this rule, as well by way of limitation of use, as by way of devise; and *ergo*, if the father limit a use to himself and his heirs until a marriage happen, and then to the son and his heirs, this is a good fee by common experience." (*n*)

Remarks on This is not a vested interest, subject to a chattel interest, the case put because the marriage might never happen; and it was never by him. intended that the estate of the father and his heirs should cease unless it should happen; and consequently the words

See § 111f. of limitation, "and his heirs," must carry the entire ownership of which the land was susceptible. This case is distinguishable from that of a limitation to trustees and their heirs, till *A.* shall attain 24, with a limitation over to *A.* and his heirs when and as he shall attain 24. In this last case, an estate is given to the trustees for a limited purpose only; and it is not intended that their estate should subsist beyond the time when *A.* shall attain 24, or when, by his death under that age, it shall have become impossible for that event ever to happen. And therefore the words "and their heirs" do not pass the fee, and the trustees only take a chattel interest.

These limitations of springing interests can only 127a
be by way of use or devise. They would be void if inserted in a deed at common law.
only be by way of use or devise.

[43] When they are by way of use, they are sometimes termed
They are springing uses. Those which are by devise are usually designated by the generic name of executory devises.
termed springing
uses and executory devises.

Definition of A limitation of a springing interest in personal 127b
a limitation estate, is a clause which creates an interest, by way

(*l*) Fearn, 298.

(*m*) 2 Bl. Com. 384. See also Fearn, 373.

(*n*) Lord Nottingham, in *Howard v. Duke of Norfolk*, 2 Swanston, 461.

of devise or of trust, to take effect at a future time, without of a spring-being preceded by, or without affecting any other interest: ing interest
Limitations of this kind, by way of bequest, are usually de- in personal
signated by the generic name of executory bequests: property.

SECTION THE EIGHTH.

Of Alternative Limitations.

128 An alternative limitation is a sentence which Definition of
creates an interest that is only to vest in case the an alterna-
next preceding interest should never vest in any way, tive limita-
through the failure of the contingency on which such pre- tion.
ceding interest depends. As *where a testator devises to *A.*
for life; and if he have issue male, then to such issue male
and his heirs for ever; and if he die without issue male,
then to *B.* and his heirs for ever; or, where a testator be-
queaths personal estate to the first son of *A.*; and if *A.*
should have no son; then to *B.*(*o*)

129 These limitations, or the gifts made by them, Different
considered in conjunction with those for which names given
they are substitutionary, are sometimes termed *contingen- to these limita-
cies with a double aspect; (*p*) or *gifts upon a double con- tations.
tingency; (*q*) or *gifts or devises upon two alternative con- [44]
tingencies.(*r*)

130 From the definition it will appear, that a subse- Requisites to
quent limitation cannot be an alternative limitation, an alterna-
unless the prior limitation for which it is a substitute, is either tive limita-
an hypothetical limitation, or a contingent limitation when tion.
considered antecedently to the event on which the subse- See § 114.
quent limitation is to take effect; nor unless the contingency
on which the subsequent limitation is to take effect, is the
reverse of the contingency on which the preceding limitation
is to take effect.

131 Where the event on which an alternative limita- The omis-
tion is to take effect, is the non-existence, at a par- sion of the
ticular time, of the person who is to take under the preced- condition on
ing limitation; the condition that such person shall be in which the

(*o*) *Loddington v. Kime*, 1 Salk. 224, as cited, Fearn, 225, 378. And see
Doe d. Brown v. Holmes, 3 Wils. 237, 241, as stated, Fearn, 374; and *Higgins*
v. Dowler, or *Derby*, 1 P. W. 98; *Stanley v. Leigh*, 2 P. W. 686; *Stephens*
v. Stephens, Cas. temp. Talb. 228; *Green v. Elkins*, 3 P. W. 306. note (F), 4th
ed., as stated, Fearn, 518—522.

(*p*) See *Goodtitle v. Billington*, Dougl. Rep. 725, or 735 ed. 3; and *Lod-*
dington v. Kime, as stated, Fearn, 267, 373; and *Hockley v. Mawbey*, 1 Ves.
149, stated, § 530.

(*q*) Arg. of Counsel in *Leake v. Robinson*, 2 Meriv. 362.

(*r*) Arg. of Counsel in *Ring v. Hardwicke*, stated *infra*; *Hockley v. Maw-*
bey, 1 Ves. 150.

prior limitation is to take effect. *esse* at that time, in order to enable such prior limitation to take effect, is 'seldom expressed, and is only implied by the circumstance that another person is to take if such first mentioned person is not in *esse* at that time.^(s) It is this which so frequently causes a doubt, whether the existence of the party is a condition precedent to the vesting of the prior limitation; and consequently, whether the subsequent limitation is an alternative or not. It would, therefore, be desirable that the condition should be expressed, upon which the prior limitation is to take effect, as well as the opposite condition on which the subsequent, alternative limitation is to take effect.

Two kinds of Alternative limitations, as regards their form, 132
alternatively- may be divided into two kinds. The one may be
mitations, as termed an alternative limitation of the *proper or explicit*
regards their *form*; the other, an alternative limitation of the *improper*
form. *or elliptical form*.

[45] I. An alternative limitation of the *proper or ex-* 133
Definition of *explicit form*, is one in which the reverse contin-
an alterna- gency on which the alternative interest is to arise, is ex-
tive limita- pressed; as in the example above given in illustration of
tion of the the definition of an alternative limitation. (See § 128.)
proper or explicit form.

— improper II. An alternative limitation of the *improper or* 134
or elliptical *elliptical form*, is one in which the reverse con-
form. tingency on which the alternative interest is to arise, is
only implied.

The contin- The contingency is sometimes implied by the 135
gency some- word "or," introducing the limitation.

Thus, where a testator bequeathed a sum of stock to
by the word each of his nephews and nieces, *or* to their respective
"or." child or children: should any die without child, his share
to revert to the residuary legatee. It was held, that
Montagu v. the legacies vested absolutely in the nephews and nieces
Nucella, 1 who survived the testator, and that the child or children of
Russ. 165. the nephews or nieces took only as substitutes for their pa-
rent or parents dying in the testator's lifetime. The same
testator appointed as his residuary legatee *E. P. M.*, his
child or children; in case of his death without any such,
then, the residuary interest to vest in his other nephews and
nieces then alive, share and share alike; and, as before, to
each of their respective child or children; and in case of
either of their deaths without any such issue, then his or her
share to be divided among the survivors, or to vest in the
last survivor, or his or their representative or representa-

(s) See *Hockley v. Mawbey*, 1 Ves. 142; *Doe d. Davy v. Burnell*, 6 D. & E., 80; *Doe d. Gilman v. Elvey*, 4 East, 313; *Merest v. James*, 4 Moore, 327, 1 Brod. & Bing. 127, stated, § 530.

tives. It was held, that the words "*E. P. M.*, his child or children," must be read as "*E. P. M.*, or his child or children;" and that the residuary clause must be construed as the previous clause was; and as *E. P. M.* survived the testator, the residue, upon that construction, vested in him absolutely. If he had died leaving children who survived the testator, they would have taken the residue; had they died in the testator's lifetime, his other nephews and nieces and their children would have become entitled in a similar manner.

A testator bequeathed 6000*l.* in trust for his daughter, for *Jones v. To-* life; and, after her decease, he gave the same to the chil- *rin*, 6 Sim. dren, or their descendants, of *T. F.*, in such proportions to 255. each as his daughter might direct. Sir L. Shadwell, V. C., held, that the descendants were mentioned merely as substitutes for the children; and that the children were entitled to the fund, there being a direct gift with a power of selection. [46]

136 Sometimes the contingency on which the alter- The contin- native interest is to arise, is implied in the con- *gency come-* text. And this would appear to be the case, where a timesimplied fund is bequeathed in trust for a person and his issue, in the con- with a direction to the trustees to pay over to such person, text. the corpus, and not merely the interest of the fund.

A testator bequeathed all his personal property, not be- *Pearson v.* fore disposed of, unto his trustees, in trust for his five sons, *Stephen*, 2 and their respective issue, (if any,) such issue to take *per* *Dow &* *stirpes*, and not *per capita*, to be divided amongst them in *Clark*, 328. equal shares and proportions: the shares of such of them as should have attained twenty-one, to be paid to them respectively forthwith after his decease, and the shares of such of them as should be under the age of twenty-one years, to be paid to them when and as they should respectively attain such age. At the date of the will, and of the testator's death, the eldest son was married and had four children. The other sons were unmarried. The Master of the Rolls held, that each of the sons was entitled to a fifth for life only, remainder to his issue, to be paid to them at twenty-one. This judgment was reversed by the House of Lords, by whom it was decided, that this was "an absolute gift to the testator's five sons, to be paid, at the time and in the manner specified, to the testator's sons living at the time of his decease; but if any of the said sons was at that time dead, then, to go to the issue of that son: such issue to take as the *stirpes* would, and not on a division *per capita*." The Lord Chancellor, in proposing that decision, relied on the case of *Butter v. Ommaney*, 4 Russ. 70; and he observed, that there was no making sense of the will, unless it was so construed; and it was evident, that, in the hurry of the last day of the sittings, the attention of the

Master of the Rolls had not been fully drawn to the terms of the will.

Observations on *Pearson v. Stephen*. It is not stated in the Report in what way His Lordship showed that this construction was required by the terms of the will; but it may be remarked, that it appears from the words of the decision, as above cited, that the word "them"

[47]

was considered as referring to the sons, being connected with the word "sons," though the word "sons" was not the next antecedent, by the word "their;" and hence, the will was to be construed as directing the trustees to pay over the corpus of the fund to the sons who should then have attained twenty-one. Now if the trustees were to pay over the corpus of the fund to the sons who should have attained twenty-one, it would be utterly repugnant to suppose that the sons so receiving the capital, and not merely the interest from the trustees, should only have been intended to take for life, with remainder over to their issue.

Any number of alternative interests may be limited in succession, so that each more remote interest may be limited in one. limitation may be simply a substitute for the next preceding succession.

136a.

Laffer v. Edwards, 3 Mad. 210.

A testator bequeathed a sum of stock to trustees, upon trust for his wife, for life; and after her death, to pay one third part of the principal to his son, *J. E.*, if he should then be living; and if dead, to his child or children; and one third to his daughter, *M. A. E.*, if living at the decease of his wife; and if dead, to her child or children; and the remaining third to his daughter, *H. E.*, or her child or children, in the same manner. Provided always, that if either of his said daughters should die unmarried and without issue; then, that the surviving daughter should take the share of her so dying; and if both of his daughters should die unmarried and without issue, then, their shares should go to his son, *J. E.*, if living; and if dead, to his children. *L. E.*, the testator's wife, died in his lifetime, but the son and daughters survived him. Sir John Leach, V. C., held, that in the events that had happened, the interests of the daughters vested in them absolutely. That the deaths of the daughters unmarried and without issue, was plainly referable to their deaths in the lifetime of the wife. That the only contingency in favour of their issue, was, the chance of their deaths in the lifetime of the wife.

Observations on *Laffer v. Edwards*. In this case, there was a succession of alternative limitations, as to the shares of the daughters, by means of which the children of each of the daughters were substituted for their parent, in case the parent was not living at the death of the wife; the surviving daughter, for the daughter who might happen to die without issue in the lifetime of the wife; the son, for the daughters and their children, in case neither

[48]

of the daughters and none of their children were living at the death of the wife; and the children of the son, for the son, in case he should not be living at the death of the wife. As the daughters were living at the death of the wife, the limitation to them took effect, and the shares vested in them absolutely, so that all the subsequent limitations, being mere alternative limitations, entirely failed.

SECTION THE NINTH.

*Of *Augmentative Limitations.*

137 An augmentative limitation, in the case of real estate, (or a limitation causing "an enlargement of an augmented estate upon a condition,") is "a limitation, by deed at common law, under which a term for years previously created in things that lie in livery, or a term for years in things that lie in grant, or a preceding estate for life or in tail, created by the instrument containing such limitation, is, in a given event, to be absorbed by, or transmuted into, a larger estate, of the same quality, in case such preceding estate remains unaliened, and unchanged in quality, till the fulfilment of the condition."*(a)*

138 Thus "a man," says Lord Coke, "maketh a lease for years, the lessee enters, and the lessor makes a charter to the lessee, and thereby doth grant him, that, if he pay the lessor, a hundred marks during the term, that then he shall have and hold the lands to him and to his heirs. In this case, say they, there need no livery of seisin, but it doth enure as an executory grant, by increasing of the state; and, in that case, without question, the fee simple passeth not before the condition is performed."*(b)* In the case here put, the livery of seisin appears to be dispensed with *ex necessitate*. It was not made before the lessee entered; because when the lease was made, it was not, or might not have been intended, at that time, that the lessee should have any other interest than his term. And if livery were made at the time of the subsequent grant, it would be void; because the lessee would be already in possession.*(c)* But "if a lease for years is made of land or any thing else lying in livery, with a similar condition contained in one and the same instrument, instead of a subsequent instrument; the lessee must take the fee immediately, or not at all."*(d)*

[49]

* See §114, note *.

(a) See Co. Litt. 316 a—217 b. Prest. Shap. T. 128, 129. Fearn, 265, 266, 279, 280, 339.

(b) Co. Litt. 217 b.

(c) See Co. Litt. 216 a.

(d) See Co. Litt. 217 b.

For, "if livery is made before the lessee enters, the fee passes immediately, so that the condition must be construed See § 12, 13. a condition subsequent instead of a condition precedent:(e) for "livery of seisin must pass a present freehold to some person, and cannot give a freehold *in futuro*."(f) And if livery were made "after the lessee had entered, and when he was already in possession, it would be void.(g) And "it is inconvenient," as Lord Coke observes, "that the fee simple should pass, in this case, without livery of seisin;"(h) because this would be unnecessarily opening a door to the dispensing with livery of seisin altogether, and to the mischiefs that would arise from the absence of that ceremony. In the preceding case, the fee could not pass at all unless livery of seisin were dispensed with; whereas, in this case, it could pass by livery of seisin; though it is in such case necessary to construe the condition a condition subsequent, instead of a condition precedent, so as to allow the fee to pass immediately. But it is to be observed, that there is "a diversitie between a lease for life and a lease for years. For, in the case of a lease for life, with such a condition to have fee, the fee simple passeth not before the performance of the condition; for that the livery may presently work upon the freehold. Also they take a diversitie between inheritances that lie in grant and inheritances that lie in livery. For they agree, that if a man grant an advowson for years, upon condition that if the grantee pay twenty shillings, &c., within the term, that then he shall have fee, the grantee shall not have fee until the condition be performed."(i)

[50]

SECTION THE TENTH.

*Of Diminuent Limitations.*See § 114,
note *.Definition
of a dimi-
nuent limita-
tion.See § 149a,
158.

WHAT is here termed a diminuent limitation is a clause by which it is provided, whether in a deed at common law, or by way of use or devise, that, in a particular event, an interest previously given by the same instrument, shall be transmuted into one of a lower denomination. As * where a man makes a lease for life, and if the lessee within one year pay not 20*l.*, that he shall have but a term for two years.(a)

(e) See Co. Litt. 216 b.

(f) Co. Litt. 217 a.

(g) See Co. Litt. 216 a.

(h) *Id.*

(i) Co. Litt. 217 b.

(a) Co. Litt. 218 b.; Shep. T. 129.

SECTION THE ELEVENTH.

Of Conditional Limitations.

148 ^bTHE term conditional limitation is sometimes Generic used generically to denote any kind of qualified sense of the limitation in the derivative sense; any kind of limitation, in term conditional the derivative sense, which depends upon a condition, in not incorrect contradiction to an absolute limitation; (b) or to denote tion. *an indirect special limitation, in contradistinction to a direct See § 24, 106. special limitation. (c) See § 34, 42.

This use of the term, though philologically correct enough, The use of is practically productive of a great and mischievous confu- the term in sion of ideas. In particular, special limitations, in the origi- this sense is nal sense of limits, are confounded with conditional limita- not incorrect tions, in the derivative sense, ^aspecifically so called, or, in [51] other words, with that kind of limitations, which, in contra- but yet pro- distinction to remainders, operate in defeasance of a preced- ductive of ing estate, and which are accurately distinguished from re- mischief. mainders by the learned and profound author of the forego- See § 24, 34- ing work. (d) The mode of determining an estate by means 42. of a special limitation is not peculiar to conveyances by way See § 149. of use and devise, as we shall presently see; but the mode of determining a preceding estate by means of a conditional limitation, specifically so called, is peculiar to uses and de- See § 149a. vises.

149 A conditional limitation, in the specific sense, is a Definition of ^aproviso, by way of use or devise, for the annihilation a conditional of an interest of the measure of freehold under a preceding limitation; in limitation, in a particular event which is unconnected with the specific the original quantity of that interest, (e) and which may not sense of the happen till after such interest has become vested; and for term. the creation of a new interest in its stead, in favour of another person. Or, more fully, it is a distinct clause, ^fby way of use or devise, (f) by which an interest is limited to take effect, in possession, or in enjoyment, or in both, on or at a particular time or event, in defeasance and exclusion of and by way of substitution for an interest of the measure of free-

(b) See *Holmes v. Cradock*, 3 Ves. Jun. 319; *Tolderry v. Colt*, 1 You. & Col. 631; *Prest. Shép. T.* 117; *Fearne*, 14, 17, 18.

(c) See *Fearne*, 272.

(d) See *Fearne*, 15, 16.

(e) See *Fearne*, 10, note (h), and 14—16. And see *Lloyd v. Carew*, *Prec. Chan.* 72; *Show. Cases Parl.* 137; as stated, *Fearne*, 275; *Pells v. Brown*, *Cro. Jac.* 590; *Hanbury v. Cockerell*, 1 *Roll. Abr.* 835, pl. 4; *Gulliver v. Wickett*, 1 *Wils.* 105; and *Marks v. Marks*, 10 *Mod.* 420; as stated, *Fearne*, 396, 399.

(f) See *Prest. Shép. T.* 121, 126, 127.

hold given by a previous sentence, at a period when such prior interest may have become vested even in enjoyment, and before such prior interest has lasted the full measure of duration assigned to it by such preceding sentence, either in express terms or by construction of law. As where an estate is devised to *A.* for life, or to *A.* indefinitely, provided that when *C.* returns from Rome, it shall then immediately go to *B.* and his heirs; or, where land is granted, to *A.* and his heirs, to the use of *B.* and his heirs; but in case &c., then immediately to the use of *C.* and his heirs.

[52]

Rackstraw v. Vile, 1 Sim. & Stu. 604.

So, where a testator give his son an absolute interest in one fourth of his personal estate: but, by a codocil, he directed that his son's share should be only for the life of himself and his wife, provided they had no issue, and, at their death, it should become part of the residue. Sir John Leach held, that the son took in the first instance absolutely, with a good limitation over, by way of executory devise, at the death of the survivor of himself and wife, if there be no issue then living; the failure of issue being plainly confined to the death of the survivor, by the direction that the share of the son was to become part of the residue at their death.

Conditional limitations must be really limited in defeasance of a prior interest.

Before we determine that a limitation is a conditional limitation, we must observe whether it is really and in fact, and not merely apparently or in terms, limited to take effect in defeasance of a prior interest. For, though apparently or in terms it may be limited to take effect in defeasance of a prior interest, yet, if in reality it is to await the regular expiration of such prior interest, it is a remainder, and not a conditional limitation. (g) 149*

Conditional limitation can only be by way of use or devise.

These limitations can only be by way of use or devise. They would be void if inserted in a deed at common law, being foreign to the simplicity of the conveyances employed before uses and devises were introduced. 149a

Conditional limitations termed shifting and springing uses and executory devises.

When these limitations are by way of use, they are sometimes called shifting uses, and sometimes springing uses. Those which are by devise are usually designated by the generic name of executory devises. 150

Reason of the term

These limitations partake of the destructive nature of conditions subsequent, and the creative nature of limitations in the derivative sense. (See § 12, 105—6.) And hence they are appropriately termed conditional limitations. (h) 151

"conditional limitation."

(g) See *Driver v. Edgar v. Edgar*, Cowp. Rep. 379; and *Fountain v. Gooch*, as stated and commented on, Fearn, 426—428.

(h) See Butler's note (1), Co. Litt. 203 b.

152 So far as regards the applicability of the term "springing interests," interests under conditional limitations may indeed with strict propriety be termed springing interests. But it will appear from many parts of the present Essay to be of great importance, both theoretically and practically, to confine the term springing interests to those interests which do not affect a prior interest of the measure of freehold. It is not expedient to extend the term springing interests, to interests under conditional limitations.

153 In elucidation of the foregoing definitions, it may be observed, that,—

1. By creating a new estate, conditional limitations differ from conditions subsequent; from clauses of cesser and acceleration; and from special or collateral limitations in the original sense of limits. (§ 12, 22, 34—42.) Conditional limitations in general distinguished from conditions subsequent;

154 2. By constituting a distinct clause or proviso for the cesser of a prior interest in an event unconnected with the original measure of that interest, they differ from special or collateral limitations in another respect. (See § 36.) from clauses of cesser and acceleration; and from special or collateral limitations; — from remainders, and limitations of springing interests;

155 3. By taking effect in defeasance of an interest of the measure of freehold under a preceding limitation, they differ not only from remainders, as we shall see hereafter, but also from the several kinds of springing interests which do not affect any prior interest at all, or none but a prior chattel interest. (See § 159, 117—127b, 262—280.)

156 A limitation of a springing interest operates upon the estate remaining in the grantor or his heir, or in the heir of the testator, in the same way as a conditional limitation operates upon the prior estate which is liable to be defeated by it. The limitation of a springing interest operates by divesting the estate from the grantor or his heir, in a particular event, entirely irrespective of the original measure of that estate, and by transferring it to the person who is to take the springing interest. A conditional limitation operates by divesting the estate from the person entitled under the prior estate, in a particular event which is quite unconnected with the original and regular duration of that estate, and by transferring it to the person who is to take under the conditional limitation. The difference is, that the estate divested, is, in the one case, an estate remaining in the grantor or his heir or the heir of the testator; whereas, in the other, it is an estate created by a previous clause of the instrument by which the interest was limited, which is to take effect in defeasance of it.

157 4. By being capable of taking effect in annihilation or defeasance of another interest which has become vested, they also widely differ from alternative limitations. (§ 128.) — from alternative limitations; [54]

— and from 5. By defeating a prior interest in another per- 159
augmenta- son, by way of use or devise only, even where they
tive and di- substitute a greater interest for a less, or a less for a greater,
minuent lim- they are dissimilar to augmentative and diminuent limita-
itations. tions. (§ 137, 147.)

SECTION THE TWELFTH.

*Of Remainders.**

Lax sense of THE term remainder is sometimes used in a lax 159
the term re- sense, to denote any kind of subsequent interest,
mainder. or the limitation thereof. But a limitation of a remainder,
Definition of strictly so called, is a clause creating or transferring an estate
a limitation or interest ^a in lands or tenements, (a) which is limited, either
of a remain- directly or indirectly, to take effect in possession, or in en-
der, properly joyment, or in both, subject only to any term of years or
so called. contingent interest that may intervene, ^b immediately after
the regular expiration (b) of a particular estate of freehold
previously created together with it, ^c by the same instru-
ment, (c) out of the same subject of property.

Remainders In elucidation of this definition, it may be observed,
in general that

distinguished 1. A remainder is above described as an estate 159a
from other or interest in lands or tenements, because "in per-
clauses. sonal property, under which both chattels real and personal
Remainders are included, there cannot be a remainder in the strict sense
distinguished of that word; and therefore every future bequest of per-
from future sonal property, whether it be preceded or not preceded by a
bequests. prior bequest, or limited on a certain or uncertain event, is
See § 168a, an executory bequest, and falls under the rules by which
168b. that mode of limitation is regulated." (d) And if such future
[55] bequest is preceded by, and is to take effect in defeasance
See § 148- of, a prior bequest; it is a conditional limitation. But, if
152. such future bequest is not preceded by a prior bequest; or
if it is preceded by a prior bequest, but yet it does not affect
See § 117. such prior bequest; it is a limitation of a springing interest.

An exception occurs, however, in those cases where a
future bequest is analogous to a vested remainder in real
estate; in which cases, though it is executory as regards the

*The term remainder is indiscriminately applied both to the limitation creating
and the interest created.

(a) See Lord Coke's definition quoted, *Fearne*, 3, note (c).

(b) See *Prest. Shep. T.* 128, and *Fearne*, 10, note (h), and 14—16.

(c) *Fearne*, 3, note (c); and *Snow v. Cutler*, or *Tucker*, 1 *Lev.* 135; and
Doe d. Fonnereau v. Fonnereau, *Dougl. Rep.* 470; as stated, *Fearne*, 302, 308.

(d) *Fearne*, 401, note (e); and see *Ib.* 3, note (c), 2.

possession, it is not an executory bequest, as regards the property or ownership, but confers a vested interest, and may for convenience be termed a vested *quasi* remainder. And a future bequest which is analogous to a contingent remainder in real estate, though strictly and properly an executory bequest of a springing interest, as regards the property or ownership, may for convenience be termed a contingent *quasi* remainder.

Another exception occurs in cases of limitations of present vested interests, subject to a prior chattel interest of uncertain duration, in which cases, the bequest, though executory as regards the possession or enjoyment, or both, is not executory as regards the property or ownership, but is an immediate bequest, a limitation *in presenti*.

And a third exception occurs in cases of limitations of present vested interests, where there is a mere postponement of the possession, or enjoyment, or both, and not a postponement of the property or ownership, till a future time (such as the attainment of majority) other than that of the determination of a prior interest.

160 2. A remainder is above described as limited to take effect, in possession, or in enjoyment, or in both, after the regular expiration of another estate. For a vested remainder has already taken effect in right or interest; and therefore it has only to take effect in session or enjoyment, or in possession and enjoyment. And a contingent remainder must, in many cases, take effect in interest, if at all, before the expiration of the particular estate. But, as regards the possession or enjoyment, or both, a remainder, whether vested or contingent, can only take effect, except by the operation of merger, after the expiration of the particular estate; because, it would otherwise be something more than a mere residue or remnant of the seisin, property, or ownership. In this respect a limitation of a remainder differs most essentially from a conditional limitation. A conditional limitation, as stated in the second of the foregoing definitions thereof, operates in defeasance and exclusion of a prior interest: whereas, there is no instance in which a remainder operates in exclusion of a prior interest, either by force of the limitation itself, or by construction of law. For, even *in those cases in which it absorbs the particular estate, by the operation of merger, it in effect only removes the limits of the particular estate so as to expand it into a greater estate.(c)

161 3. As taking effect after the expiration of another estate, a remainder is diametrically opposed to an alternative limitation. (See § 128, 638—649.)

— from the first six kinds of limitations of springing interests; 4. As taking effect immediately after the regular expiration of an estate of freehold, a remainder is the reverse of the first six kinds of limitations of springing interests. 162

— from augmentative limitations. See § 137. 5. In some cases a remainder may bear a close resemblance to an augmentative limitation; for a remainder may be given to the same person to whom the particular estate is limited, though usually it is not; and it may be, and in fact generally is, of the same quality as the particular estate. But as directly or indirectly limited to take effect in possession *after the regular expiration* of the particular estate, remainders invariably differ from augmentative limitations, under which a particular interest is either to be absorbed by, or, in case it is an estate tail, to be transmuted into, a larger estate, before the time of its regular expiration, and by the terms of the limitation itself. A remainder may indeed take effect in possession before the regular expiration of the particular estate, in cases where a particular estate and a vested remainder are limited to the same person, and either are, by original limitation, or become eventually, of the same quality. Thus, if land be limited to A. for life, remainder to him and his heirs in a particular event, as soon as such event happens, and the remainder vests in interest, the estate for life immediately merges in it, and the remainder becomes an estate in possession, before the regular expiration of the estate for life. And so, if a lease be made to two for life, remainder, after the decease of one of them, to the survivor in fee, the particular estate becomes, on the decease of one of them, an estate of the same quality as the remainder, that is, a sole estate; and being also in the same person, it immediately merges in the remainder, which then becomes an estate in possession, before the regular expiration of the particular estate; that is, before the decease of the survivor. (f) But this acceleration of the subsequent estate does not take place by force of the limitation itself, but by a rule of law affecting such limitations, by giving rise to the operation of merger in the case of estates so situated. 163

[57] 6. The same words also distinguish a limitation of a remainder from a diminuent limitation. (See § 147.) 7. A remainder, as the word itself imports, is always limited after a particular estate. And any preceding estate for life or in tail is termed a particular estate; (g) but the term is not applied to any estate in fee, 164

Remainders distinguished from diminuent limitations; 164
 7. A remainder, as the word itself imports, is always limited after a particular estate. And any preceding estate for life or in tail is termed a particular estate; (g) but the term is not applied to any estate in fee, 165

(f) See Fearn, 265; and *Goodtitle v. Billington*, Dougl. Rep. 725, or 735 ed. 3; as stated. Fearn, 266.

(g) Fearn, 381, note (a), 1.

however limited. Hence, though, as we have seen, a fee of limitations or other less estate may be limited to take effect in defeasance and exclusion of a prior estate in fee, by way of dimi-

nuent limitation, or conditional limitation, or under a power of appointment, or in place of a fee which has never vested, by way of alternative limitation; or on the regular expiration of a qualified fee by means of a limitation of a springing interest of the seventh kind; yet, no estate can be limited by way of remainder on the regular expiration of a fee, even though it may be only a qualified fee which cannot last longer than an estate tail. So that if an estate is limited, even by way of use or devise, to *A.* and his heirs, while *B.* or any issue of his body shall be in existence; and after the decease of *B.* and failure of his issue to *C.* and his heirs; or if an estate is limited, even by way of use or devise, to *A.* and his heirs, while he and his heirs shall continue lords of the manor of Dale; and if *A.* and his heirs shall cease to be lords of the manor of Dale, to *C.* and his heirs; the latter limitation, in each case, is void. (h) For the common law considered that a fee, even of a qualified kind, might endure for ever; so that there could be no remainder after it, but merely a possibility of reverter. And no interest limited after the regular expiration of such fee can be good as a limitation of a springing interest of the seventh kind, because it would be too remote. And if an estate is limited to the use of *A.* and his heirs till *C.* return from Rome; and after the return of *C.*, to *B.* in fee; the limitation to *B.* is not a remainder, because the preceding fee may lose its determinable quality and become absolute by the decease of *C.* without returning from Rome; (i) but it is good as a limitation of a springing interest of the seventh kind.

See § 147, 148-9, 115. See § 128. See § 126.

See § 69. See § 126, 706.

See § 126, 706.

See § 126, 706.

167 8. By limiting an estate after a particular estate created by the same instrument, a limitation of a remainder is distinguished from a limitation of the whole or the immediate part of a reversion. (See § 169.)

Remainders distinguished from limitations of the whole or the immediate part of a reversion.

SECTION THE THIRTEENTH.

Of Quasi Remainders.

168 A FUTURE bequest, which is analogous to a remainder in real estate, may be designated by this term.

See § 114, note *.

We have already seen that, "in personal property, under which both chattels real and personal are included, there

Definition of a quasi remainder.

There cannot be a remainder in personal property.

(h) Fearn, 226, note (d); and Fearn, 372, note (a).

(i) Fearn, 13, note (A*).

cannot be a remainder in the strict sense of that word.”(a)
(See § 159a.)

Chattels real
may now be
limited over,
but a limita-
tion over is
not a remain-
der, strictly
so called,
[59]
though it
may be ana-
logoustoone.

As to chattels real, a term for years is liable to 168a
destruction by certain legal means; and therefore,
if an interest is first limited for such a number of years of
the term as not to exhaust the whole duration of the term,
though, in this case, there is a remaining portion of the
term, or the beneficial interest therein, or both, to constitute
a remainder at the period of limitation; yet the term may
have ceased to exist long before a future interest can take
effect. Whereas, in the case of lands or tenements, the sub-
ject of property remains for ever; and the property or own-
ership which may be had therein, is commensurate with the
duration of the lands or tenements themselves.

Besides this, terms for years were originally of short du-
ration, created for agricultural purposes, rather than for
purposes of complicated family arrangements. And “hence
not only could there be no remainder in them, but “it was
once considered that they were incapable of any limitation
over.”(b) But “now an interest after an interest for life or
otherwise in a term may be limited, as a legal interest, by
way of devise or bequest, or as an equitable interest, either
by way of devise or bequest, or by way of trust.”(c)

The same is
the case with
chattels per-
sonal.

And as regards chattels personal, in the very na- 168b
ture of things, in order that there may be room for
a remainder, at least for a vested remainder, there must be
some portion of the ownership remaining, which has not
been previously disposed of. But in the case of chattels
personal, before the expiration of the interest first limited in
them, they may be destroyed or lost in various ways inciden-
tal to their own nature, and unconnected with the operation
of law. And the duration of personal chattels being alto-
gether uncertain, the duration of the property or ownership
is so too. And hence no remainder could be limited in them.
Besides, in times when there was but little money in the
country, and it was expedient that what little there was,
should be quickly circulated, and chattels personal chiefly
consisted of things of a perishable nature, such as corn and
cattle; it is obvious why it was considered that no remain-
der could be limited in chattels personal. A distinction,
however, was afterwards taken “between a bequest of the
use of a personal thing for life, and a bequest of the thing
itself; it being considered that a limitation over after the

(a) Fearn, 401, note (c); and see *ib.* 3, note (c) 2.

(b) Fearn, 3, note (c), 2.

(c) Fearn, 402, 404, 413; and *Manning's Case*, 8 Rep. 95; *Lampet's Case*,
10 Rep. 47; and *Cotton v. Heath*, 1 Roll. Abr. 612, pl. 3; as stated, Fearn,
402—3.

former was good.(d) And subsequently it has been held, that an interest even after a life interest in a personal chattel may be limited, *as a legal interest, by way of bequest,(e) or, *as an equitable interest, either by way of bequest(f) or *by way of trust.(g)

SECTION THE FOURTEENTH.

Of Limitations of the Whole, or the Immediate Part of a Reversion. See § 375-382.

169 LIMITATIONS of the whole, or the immediate part, of a reversion, are limitations of an entire previously subsisting reversion, or of a part of it, to take effect in possession, subject only to any term for years or contingent interest that may intervene, immediately after the regular expiration of the particular estate or estates of freehold duration created by a previous instrument out of the same subject of property. Definition of these limitations of the reversion.

CHAPTER THE FIFTH.

[61]

VESTED AND CONTINGENT REMAINDERS DEFINED AND DISTINGUISHED.

SECTION THE FIRST.

Vested and Contingent Remainders in general defined and distinguished.

170 REMAINDERS are either vested or contingent; and each of these two kinds may be defined in three different modes: Three modes of defining vested and contingent remainders.

- I. Without reference to the right of possession or enjoyment, or the possession or enjoyment itself.
- II. With reference to the right of possession or enjoyment.

(d) Fearné, 402.

(e) See Lord Chancellor's observations in *Foley v. Burnell*, 1 Bro. Chan. Cas. 274, as stated, Fearné, 412; and *Hoare v. Parker*, 3 Durn. & East, 376, as stated, Fearné, 415. But see also, *contra*, Fearné, 413, 414.

(f) *Catchmay v. Nickolls*, and *Shirley v. Ferrers*, 1 P. W. 6, in note; and *Hyde v. Perratt*, 1 P. W. 1; as stated, Fearné, 405—6.

(g) *Cadogan v. Kennet*, Cowper, 432; as stated, Fearné, 408.

III. With reference to the possession or enjoyment itself.

Vested and contingent remainders defined without reference to the right of possession or enjoyment, or the possession or enjoyment itself.
See § 47-8.

I. A VESTED REMAINDER, if defined without reference to the right of possession or enjoyment, or the possession or enjoyment itself, (which is perhaps the most scientific and accurate mode,) may be defined to be, a portion of the seisin, property, or ownership, of the measure of freehold, next after a preceding freehold estate, and actually acquired by, and residing in, the person who is said to have such vested remainder. (See § 91.) 171

A CONTINGENT REMAINDER, on the other hand, 172 may be defined to be, a portion of the seisin, property, or ownership, of the measure of freehold, which is next after a preceding freehold estate, and is not yet acquired by the person who is said to have such contingent remainder, but is appointed, by the terms of the grant or devise, to be acquired by, and to reside in him, in a contingent event.

Vested and contingent [62] remainders defined with reference to the right of possession or enjoyment.
See § 50, 51.

II. A VESTED REMAINDER, if defined with reference to the right of possession or enjoyment, (which is the mode adopted by Fearn, e,) may be defined to be, one that is so limited to a person in being and ascertained, that (subject to any such chattel or other interest collateral to the seisin, property, or ownership, as extends to the possession or enjoyment) it is capable of taking effect, in possession or enjoyment, on the certain determination of the particular estate, without requiring the concurrence of any collateral contingency. 173

A CONTINGENT REMAINDER, on the other hand, 174 is one that is so limited as not to be capable of taking effect in possession or enjoyment, on the certain determination of the particular estate, without the concurrence of some collateral contingency.

Vested and contingent remainders defined with reference to the possession or enjoyment itself.

III. A VESTED REMAINDER, if defined with reference to the possession or enjoyment itself, may be defined to be, a remainder which, as regards the possession or enjoyment, or both, (subject to any such chattel or other interest collateral to the seisin, property, or ownership, as extends to the possession or enjoyment,) does not strictly depend on any uncertainty at all, or any other uncertainty than that of its enduring beyond the preceding interest. 175

A CONTINGENT REMAINDER, on the other hand, 176 is one which, as regards the possession or enjoyment, does strictly depend on a contingency irrespective of its own duration.

SECTION THE SECOND.

The Distinctions between Vested and Contingent Remainders pointed out, with Observations thereon.

177 I. THE non-existence, in a vested remainder, and Distinction
the existence, in a contingent remainder, of a con- as regards
tingency irrespective of its own duration, on which the pos- the mode of
session or enjoyment strictly depends, is that which consti- their cre-
tutes the fundamental distinction between them, as regards ation, form-
the mode of their creation, and that which forms a true, tan- ing a true
gible, and practical criterion for determining to which of the criterion.
two species a remainder belongs.

II. And from this distinction in the mode of their creation, Consequen-
two others, pertaining to their nature and qualities, neces- tial distinc-
sarily flow : tions pertain-

178 1. In the one kind of remainder, there is, while [63]
in the other, there is not, an actually acquired por- ing to their
tion of the seisin, property, or ownership, at present, fixed, nature and
and legally transferable right, and a present capacity (sub- qualities.
ject to any such chattel or other interest collateral to the See § 47-8.
seisin, property, or ownership, as extends to the possession See 50, 51.
or enjoyment) of taking effect in possession or enjoyment at
any moment there may be a vacancy during the continu-
ance of the remainder, without requiring the concurrence of
any collateral contingency.

179 2. And in the one kind of remainder (subject
as aforesaid) there is a certainty, while, in the
other, there is an uncertainty of the possession or enjoyment
itself, apart from the relative uncertainty of its own dura-
tion.

180 It is not the indefeasibleness of the right of pos- It is not the
session or enjoyment, or the absolute certainty of indefeasible-
the possession or enjoyment itself, which distinguishes a ness of the
vested from a contingent remainder. In relation to the in- right of pos-
defeasibleness of the right, and the certainty of the posses- session or
sion or enjoyment itself, a vested remainder may be uncer- enjoyment,
tain as well as a contingent remainder. For, if land is nor the abso-
limited to the use of *A.* for life, remainder to the use of *B.* lute certainty
for life, subject to a power of revocation and new appoint- of the posses-
ment, the remainder is vested; because, from the very in- sion or en-
stant of its creation, it is capable of taking effect in posses- joyment
sion or enjoyment at any moment the possession or enjoy- itself, which
ment may become vacant by the death of *A.* And yet it distinguishes
may possibly never take effect in possession or enjoyment, a vested re-
because *B.* may die before *A.*, or the use of *B.* may be re- mainder.

revoked, or *B.* may surrender to the reversioner.

But still a vested remainder is only uncertain on account of the relative uncertainty of its own duration.

But, nevertheless, though a vested remainder is not absolutely certain of taking effect in possession or enjoyment, it is only uncertain on account of the uncertainty of its duration in relation to the duration of the particular estate; it is only uncertain on account of the possibility or probability that it may expire or be defeated before the determination of the particular estate. No condition is to be fulfilled, no event to happen, before the right of future possession or enjoyment can be perfect; nothing is wanting to render the capacity of possession or enjoyment complete. And in regard to the indefeasibleness of the right of possession or enjoyment, and the possession or enjoyment itself, a vested remainder is sure ultimately to take effect in possession or enjoyment, if only it endures beyond the preceding estate. For, it is limited to take effect after an estate which must expire at a time or on an event certain, and it was either capable at the very first, or has subsequently become capable of taking effect in possession or enjoyment at that time, or at any moment that event may happen, without requiring the concurrence of any contingency, as respects its capacity of taking effect at that particular period.

A remainder may be limited on a contingency, and yet be vested.

It may indeed be limited in such a way as to be capable of vesting in possession either on a contingent determination, or on the certain expiration of the particular estate, whichever shall first happen. But, even in this case, the remainder is not contingent, (a) but rather, in fact, the more certain. For, if the contingency should not happen before the certain expiration of the particular estate, it can of course have no effect either on that estate which has already expired, or on the remainder which has already vested in possession or enjoyment. And if the contingency should happen before that time, it cannot render a remainder contingent, which might have taken effect in possession or enjoyment if that contingency had never happened. On the contrary, the fact that the remainder might vest in possession or enjoyment either on a contingent determination or on the certain expiration of the particular estate, would, in many cases, only serve to render such remainder more certain of taking effect in possession or enjoyment; inasmuch as if the contingency is likely to happen before the certain expiration, the remainder would be less likely to have terminated before the particular estate, and consequently would be all the more certain of taking effect in possession or enjoyment. Thus, if land be limited to *A.*, during widowhood; or to *A.* for life, if she continue unmarried; remainder after the death or marriage of *A.*, to *B.* for

(a) See Fearn, 19.

life, this is a vested remainder, and more certain of vesting in possession or enjoyment, than if the limitation had been to *A.* for life, remainder to *B.* for life; because *A.* may marry, and *B.* may live till the contingent determination of the particular estate consequent thereon, that is, till after the marriage of *A.*, but may die before the time at which the particular estate is sure to terminate, that is, before the death of *A.*, which may not occur till many years afterwards. A vested remainder, then, though it may be limited to take effect, or capable of taking effect, in possession or enjoyment, as well on a contingency as on a certainty; yet, in the words of the definition, it does strictly depend on no other uncertainty than that of its enduring beyond the preceding interests. See § 175.

SECTION THE THIRD.

The several kinds of Contingent Remainders defined, with Observations thereon.

The learned and profound author of the foregoing Treatise on Contingent Remainders, has accurately divided contingent and defined them, and has distributed them into four remainders. classes:—

184 I. "Where the remainder depends entirely on a contingent determination of the preceding estate itself: as if *A.* makes a feoffment to the use of *B.* till *C.* returns from Rome, and after such return of *C.*, then to remain over in fee." (a) Definition of the first kind of contingent remainders;

185 II. "Where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate:" (b) "as if a lease be made to *A.* for life, remainder to *B.* for life, and if *B.* die before *A.* remainder to *C.* for life." (c) — of the second kind;

186 III. "Where a remainder is limited to take effect on an event, which, though sure to happen some time or other, yet may not happen till after the determination of the particular estate: as if a lease be made to *J. S.* for life, and after the death of *J. D.*, the lands to remain over to another in fee." (d) — of the third kind.

187 IV. "Where a remainder is limited to a person not ascertained, or not in being, at the time when such limitation is made:" as if a lease be made to one for life, remainder to the right heirs of *J. S.*, (e) who is living; or remainder to the first son of *B.*, who has no son then born; or if an estate be limited to two for life, remainder to the survivor of them in fee. (f)

(a) Fearn, 5.

(c) Fearn, 7.

(e) Fearn, 9.

(b) Fearn, 5.

(d) Fearn, 8.

(f) Fearn, 9.

Remarks
on a devise
to two,
and the sur-
vivor, and the
heirs of such
survivor.

But it may here be observed, that although it 187a
be thought that a devise to two, and the survivor
of them, and the heirs of such survivor, gives them a joint
estate for life only, with a contingent remainder and fee to
the survivor; yet, notwithstanding the case of *Vick v.*
Edwards, 9 P. W. 372, where such a devise is in trust to
sell, or upon any trust which renders it necessary that the
devisees in trust should have the fee, they will be construed
to take the fee, even in a court of law. (g) For, though a
court of law cannot take cognizance of a trust, as such; yet,
it has frequently taken notice of the existence of the object
or purpose for which a devise was made, with the view of
determining the quantity of interest which the testator in-
tended the devisees to take. (h) The Court, in such cases,
has taken notice of the expression of the object or purpose
as an indication of intention, though not as a trust.

All the kinds
of contingent
remainders
strictly de-
pend on a
contingency
irrespective
of their own
duration.

It must be particularly observed, that, in the 188
first class, the remainder depends *entirely* on a
contingent determination of the preceding estate: for it has
been shown, that a remainder may be limited on a contin-
gent determination of the particular estate, and yet be
vested, so long as it is also capable of taking effect in posses-
sion on the certain expiration of that estate, without regard
to any collateral contingency. (i) In the second and fourth
classes of contingent remainders, the remainder may be
limited on the certain expiration of such estate; but yet it is
contingent in respect to the person of the grantee, or in re-
gard to some collateral events constituting a condition pre-
cedent which must be fulfilled before the remainder would
be capable of taking effect in possession or enjoy-
ment. And though, in the third class, the event, 189
when viewed by itself, is not contingent, because
it must happen some time or other, yet the remainder does
not depend on the mere occurrence of that event irrespective
of any particular time, but on the fact of its occurring be-
fore the expiration of the preceding estate, which
is strictly a contingency. And hence all the kinds 190
of contingent remainders, even where they are
limited on the certain expiration of the particular estate,
do, according to the foregoing definition, strictly depend on
a contingency irrespective of their own duration.

See § 176.

They may all
be combined
in the same
limitation.

The several kinds may all be combined in the 191
same limitation, as in the case of "a limitation to
A., till *B.* returns from Rome, and after the return of *B.*
and *C.* from Rome, and the death of *D.*, to the sons of *A.*,

(g) See Fearn, 557—559, and Butler's note (c) to p. 358.

(h) See the author's note (1) to Fearn, 226.

(i) Fearn, 19; and *Lord Vaux's Case*, Cro. El. 269, as there stated.

in tail male, who shall first or alone attain the age of 21 years.”(k)

192 A remainder after an estate tail may seem to be a contingent remainder of the first kind. But after estates failure of issue, though it may not happen till a very distant period, and though it is entirely uncertain when it will hap-

pen, is considered certain to happen some time or

193 other. And hence a remainder limited on an estate tail, without reference to a failure of issue at

any particular time, and without requiring the concurrence of any collateral contingency, does not fall within the defi-

nition of, and therefore is not an exception from, the first kind of contingent remainders, but is strictly and

194 properly a vested remainder. But if an interest is limited to take effect on the regular expiration

of an estate tail by reason of a failure of issue at a particular time, as, for instance, at the death of the tenant in tail, such

interest is a contingent remainder.(l)

195 Every kind of interest which is a contingent remainder in relation to the preceding estate, may be- A contingent [68]

come a vested remainder in relation to that estate, except the first of the four kinds of contingent remainders. For in the remainder may become

three last kinds, the event on which the remainder depended, being unconnected with the preceding estate, may happen a vested re-

during the continuation of that estate, so as to remove the contingent character of the remainder dependent thereon,

and convert it into a vested remainder. But, in the first kind, as the event forms the limit of the preceding estate

itself, no sooner does that event happen, than the preceding estate ceases, and the interest which was to take effect on

such event, immediately becomes an estate in possession, or in enjoyment, or both in possession and enjoyment.

(k) Fearn, 9, note (g).

(l) See Fearn, 7, note (d); and *Driver d. Edgar v. Edgar*, Cowp. Rep. 379; and *Fountain v. Gooch*; as stated and commented on, Fearn, 426—428.

PART II.

**RULES AND PRINCIPLES FOR DISTINGUISHING CERTAIN
CASES OF ONE KIND OF LIMITATION CREATING AN
INTEREST, FROM ANOTHER KIND TO WHICH THEY
MAY APPEAR TO BELONG.**

CHAPTER THE FIRST.

OF THE CONSTRUING A LIMITATION TO BE A REMAINDER RATHER THAN AN EXECUTORY LIMITATION NOT BY WAY OF REMAINDER.

- 196 ^aIt is a well-known rule, that a limitation shall, The general
if possible, be construed to be a remainder, rather rule, as com-
197 than an executory devise.^(a) Or, to express the monly stated.
rule more precisely, and in its true extent, a limi- See § 674-5.
tation, whether by deed or devise, shall, if it possibly can The general
consistently with other rules of law, be construed to be a re- rule, as more
mainder rather than an executory limitation not by way of accurately
remainder. stated.
- 198 ^bThe reason which is usually^(b) and justly as- Reason
signed for this rule is, that an executory interest, usually as-
not by way of remainder, unless it is engrafted on an estate signed for
tail, cannot be barred; and, consequently, there is a ten- the same.
dency in such interests, to a perpetuity, which is contrary to
the policy of the law.
- 199 It may be added, however, that it may perhaps An addition-
have been originally adopted, partly at least, for al reason.
another and more general reason, which would seem to
affect executory interests engrafted on an estate tail, as well
as those engrafted on other estates, though the application
of that reason has ceased since the Statute of Uses. Before
that statute, executory interests which were not by way of re- See § 159,
mainder, or by way of augmentative or diminuent limitation, [72]
could only be limited by way of use or devise; and they 137, 147,
were mere trusts, which could only be enforced in equity; 127a, 149a.
and therefore it is not improbable that the Courts, for this
reason, as well as for the preceding, may have inclined to-
wards construing a limitation to be a remainder, rather than
an executory interest not by way of remainder.

(a) *Fearne*, 386, 395; and *Purefoy v. Rogers*, 2 Saund. 380; *Walter v. Drew*, Com. Rep. 372; *Wealthy v. Bosville*, Rep. K. B. temp. Hardw. 258; *Carwardine v. Carwardine*; *Doe d. Mussel v. Morgan*, 3 Durn. & East, 376; *Doe d. Browne v. Holme*, 3 Wils. 237; and *Goodtitle v. Bitington*, Dougl. Rep. 728, or 785 3d. ed.; as cited, *Fearne*, 386—394. *Spalding v. Spalding*, Cro. Car. 185; as stated, *Fearne*, 420.

(b) See Lord Eldon's observations in *Doe d. Barnfield v. Wetton*, 2 Bos. & Pul. 337.

CHAPTER THE SECOND.

OF THE CONSTRUING AN INTEREST TO BE VESTED, RATHER
THAN CONTINGENT.

SECTION THE FIRST.

The Rule stated and the Reasons thereof explained.

The general rule, as commonly stated. It is a well-known general rule, that an interest shall be construed to be vested, rather than contingent. Or, to express the rule more precisely, that, in doubtful cases, an interest shall, if it possibly can consistently with other rules of law, be construed to be vested in the first instance, rather than contingent; but, if it cannot be construed as vested in the first instance, that at least it shall be construed to become vested as early as possible.

Reasons thereof; namely, The following reasons may be assigned for this rule:—

1. Destructibility of contingent interests. 1. A contingent interest is generally more liable to be destroyed than one that is vested; and it is to be presumed, that a testator intends that species of limitation which will be most likely to secure the accomplishment of his plans.

2. Abuse of the property by the heir at law in the interim. 2. "Testators that create contingent estates," observes Lord Chief Justice Best(a), "often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of and not from the bounty of the testator, or from the mistake of the professional man who drew the will, will make the most they can of them, during the time that they remain heirs, regardless of any injury that the estates may suffer from their conduct."

3. Unsettled state of the family whose interest is contingent. 3. "The rights of the different members of families not being ascertained while estates remain contingent, such families continue in an unsettled state which is often productive of inconvenience, and sometimes of injury to them."

(a) In *Duffield v. Duffield*; 1 Dow. & Clark, 311, 312.

206 4. "If the parents attaining a certain age, be a 4. Want of condition precedent to the vesting estates, by the provision for death of their parents before they are of that age, children of loose estates which were intended for them, and which their parents dy- relation to the testators may give them the strongest claim to." ing under age of 21, to

207 "But," (adds the learned Judge(b), as to the last- mentioned reason for construing a devise contin- gent,) "is it wise to encourage the marriage of infants, by making a provision for the children, however improvident, and however much in opposition to the wishes of their guardians, such marriages may be contracted? The uncer- tainty of a provision for a family may occasion a pause, before the most important step in life be taken, which can- not be attended with lasting inconvenience, and may pre- vent lasting misery. Children will seldom suffer from estates remaining contingent until their parents attain the age of 21, as few to whom such estates are given will have legitimate children before they are of age." which vest- ing is post- poned. See § 94, 748. Weight of this reason may be doubted.

208 5. In other cases, where the interest is contin- gent on account of the person, and where, as we shall see hereafter, the interest is consequently untransmis- sible to the representatives of the person, in the event of his death before the condition is fulfilled; the same reason applies, and with more force, because not counterbalanced by the objections urged by the learned Judge against con- struing an interest to be vested, which is apparently made contingent upon the attainment of the age of 21. 5. Want of provision for children in other cases where the interest is contingent on account of the person. See § 94, 748.

209 6. Where the vesting is apparently suspended till the attainment of a certain age, and there is no disposition of the interim income, and no provision for the maintenance of the person interested; if the interest is held to be contingent, he may be entirely left without the means of being educated and maintained, or without the means of being educated and maintained in a manner suitable to the fortune which in all probability he will afterwards possess, whom con- tingent inter- ests are given. [75]

§ 209a. 7. The law favours the alienation of property; whereas the contingent quality of an interest renders such interest incapable of being directly transferred by deed, or even by a fine or recovery. (See § 754.)

SECTION THE SECOND.

The Application of the Rule to Limitations in favour of a person of a given Character.

210 I. WHEN a testator, after devising particular When an ul- estates, makes an ultimate devise to his heir at law, timate limi-

tation in
favour of an
heir creates a
vested inter-
est.

such ultimate devise does not create a contingent remainder in favour of a person who shall answer the description of heir at law on the expiration of the particular estates, but creates a vested interest in favour of the person who is the heir at law of the testator at the time of his death, even though the person to whom the first particular estate is devised, is the testator's eldest son and heir at law, and though the mere form of the devise may seem clearly to indicate a contrary intent.

Reason for
the rule.

The reason of this is, not only that the law leans 211 in favour of vesting, but also because the word "heir," unqualified by any adjective, is a technical word, denoting the person on whom the law casts the inheritance on the ancestor's decease.

*O'Keefe v.
Jones*, 13
Ves. 412.

A testator devised to his sons for life, and to their first and other sons, in tail; and, in default of such issue, then to his next heir at law. Sir W. Grant, M. R., held that this was not a contingent remainder to such person as should be the heir at law of the deviser at the time of failure of issue, but that the eldest son took the reversion.

*Doe d. Pil-
kington v.
Spratt*, 5
Bar. & Adol.
731.

And where a testator devised to a younger son and others, for their lives; and, after their decease, to the male heir at law of him the testator, his heirs and assigns for ever. It was held, that the fee vested, at the testator's death, in the person who was then his male heir at law, and did not remain contingent until the determination of the life estates, and vest in the person who, upon such determination, sustained the character of his male heir at law. The grounds of this decision were, that the law favours the vesting of estates, and that there was nothing to show that the testator did not mean, by the words "male heir at law," what the law would strictly speaking intend heir male at law at the time of his death—nothing, at least, beyond what was barely sufficient to raise a conjecture to the contrary.

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When an ul-
timate limi-
tation in
favour of an
heir creates
a contingent
interest.

*Marquis
Cholmon-
deley v.
Lord Clin-
ton*, 2 Jac. &
Walk. 1.

II. But where a person devises to the heir of a 212 person previously deceased (or, it is conceived, to his own heir), and it appears that he meant the person who should answer that description on the expiration of the particular estates; the ultimate limitation to such heir, will create a contingent remainder accordingly.

George, Earl of Orford, in a conveyance to uses, reciting, that he was desirous that certain estates, derived from his mother's family, should remain in the family of Samuel Rolle, (deceased,) his maternal grandfather, in consideration of his natural love and affection for his relations, the heirs of Samuel Rolle, and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settled them to the use of himself for life, remainder to the heirs of his body; for default of such issue,

as he should appoint; and, for default of appointment, to the use of the right heirs of Samuel Rolle, with a power of revocation and new appointment. The question was, whether the ultimate limitation designated the right heirs at the date of the deed, or the right heirs at the determination of the preceding estates, or some existing person other than the person who actually sustained the character of right heir at the date of the deed. Sir W. Grant, M. R., thought that the words "right heirs" had one settled uniform legal import, according to which the Court was bound to consider them as conferring a vested remainder on the person who was the right heir of Samuel Rolle at the time of the execution of the deed, notwithstanding any manifestation of a contrary intent. (2 Jac. & Walk. 68, 69.) But he directed a case for the opinion of the Judges of the Court of King's Bench. Three of the Judges, namely, Abbott, Holroyd, and Best, certified in conformity to the opinion of Sir W. Grant. (*Ib.* 2.) But Mr. Justice Bayley gave a contrary opinion, that the ultimate limitation conferred a contingent remainder on such person as should be right heir of Samuel Rolle on the expiration of the preceding estates. (*Ib.* 3.) And Sir Thomas Plumer, who had succeeded to the office of Master of the Rolls, decided in consonance with the opinion of Mr. Justice Bayley. It was acknowledged on all hands, that the object of the settlor was to carry the estate to his relations on the mother's side, on his death without issue: (*Ib.* 77.) and, in fact, as he was of advanced age, and without issue, and unmarried, at the time when the deed was executed, that was evidently his sole object. (*Ib.* 72.) And it was admitted; that if the words right heirs were referred to the period of the expiration of the preceding estates, according to the opinion of Mr. Justice Bayley and Sir Thomas Plumer, the whole deed would then be consistent, intelligible, and operative. (*Ib.* 79.) If, on the other hand, the interpretation of Sir W. Grant and the three other judges had been adopted, the whole deed would have been inexplicable and useless. For, the settlor being the only son of his mother, who was the only child of Samuel Rolle, must have known that no person could be the right heir of Samuel Rolle, so long as he or any of his issue were living, but he the settlor himself and his issue; and the settlor and his issue being already provided for by the preceding limitations, it was, under these circumstances, utterly inconsistent to suppose that they were intended by the words right heirs of Samuel Rolle, in the ultimate limitation. And if the estate had vested in the settlor himself under the ultimate limitation, it would, on his death without issue, have passed to his paternal uncle, to the entire exclusion of the Rolle family. (*Ib.* 73, 78.) From these considerations, it was evident, that the settlor did not intend to confer a

vested remainder on the person who was right heir when the deed was executed; and that he did intend to confer a contingent remainder on the person who was right heir on his death and failure of issue. And there was no just reason why this intention should not be carried into effect. "Laying aside inference and presumption, the words right heirs of S. R. contain a general description of a person standing in that relation to S. R. at some time or other, but not necessarily at any particular time As it stands, it is a generic, not a specific description; it wants all that can give it particularity and identity Without some addition, therefore, to the description, no use can be made of it" (*Ib.* 87, 88.) "In the absence of any secondary proof of intention being afforded to the deed, to supply the meaning thus left imperfect, the law steps in to supply the meaning, by presumption, in favour of vesting in an existing character." But this is only when the grantor himself has been totally silent (*Ib.* 81); for, "it is contrary to all principle, that presumption should be allowed to operate in opposition to direct proof." (*Ib.* 89.) "Is the Court to persevere in adherence to a supposition, when it is, in the particular case, proved to be ill-founded?" (*Ib.* 82.)

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Devise to a person by any other description, denotes a person sustaining such description at testator's death.

See § 200-9.
Perry v. Phelps, 1 Ves. 250.

III. Where a testator devises to a person by 214 any other description denoting a person sustaining a particular character, (such as youngest or only surviving son, or a child other than and except the first or eldest or an only son, or the nearest in blood;) the devise creates a vested interest in favour of the person answering that description at the death of the testator. This is in accordance with the general rule, that an interest shall, if possible, be construed to be vested, rather than contingent.

A testator gave personal estate, and rents and profits of real estate, in trust to accumulate until the youngest or only surviving son of the trustee should attain 21, and then to be laid out in land, and conveyed, with other real estate, to such son. *J. T. L.*, the only surviving son, attained 21, and died in his father's lifetime. The Lord Chancellor held, that the vesting of the property was not suspended until the death of the father, but that it vested in *J. T. L.* by executory devise, subject to be divested by the birth of another son of the trustee.

From this case, it might appear that the interest does not vest indefeasibly, but subject to be divested in case of the given description ceasing to belong to the party, and attaching in another person. But this doctrine was overruled by subsequent decisions: Thus, a testatrix devised all her real estates to the use of *B. F.*, for life; and from and immediately after his decease, then, to the use of the second, third, fourth, and all and every other the son and sons of *B. F.*

Driever v. Frank, 3 Mau. & Sel. 25.

(except the first or eldest son,) severally, successively, and in remainder, one after another, and of the several and respective heirs male of the body and bodies of every such son and sons (except the first or eldest son;) and for default of such issue, then she devised to the use of *F. S.*, youngest son of *W. S.*, &c. *B. F.* and *W. S.* were the husbands of the testatrix's nieces; and *B. F.* was tenant in tail in possession of large landed estates; and *W. S.* was tenant in fee of some part, and tenant for life, with remainder to his eldest son in tail, of other part, of estates of considerable value. *B. F.* had no children at the date of the will, *W. S.* had two, if not more. Lord Ellenborough, C. J., was of opinion that the remainder to the sons of *B. F.* was a contingent remainder to such son of *B. F.* as should be the second son of *B. F.* at the death of *B. F.*; or a vested remainder in the second or other son of *B. F.*, liable to be divested by his becoming the first or eldest, by the death of his elder brother in the lifetime of *B. F.*: (3 *Mau. & Sel.* 54, 55 :) because the cases fully established, that the first born son is synonymous with eldest, and that eldest means the first son capable of taking under that denomination at the time to which the will refers, which there was at the death of *B. F.*, the tenant for life (*Ib.* 61); and because it was morally certain, that the intention was, to erect a new family, with that view, to prevent the union of the estates of *B. F.*'s family, or of *W. S.*'s family, with those devised by the will (*Ib.* 50—53); and such being the case, the Court was not warranted in making another will for the testatrix, which it would be indirectly but in effect completely doing, if it adopted such a construction as excluded inconveniences which the testatrix did not contemplate, and sacrificed objects which she did. But, it was held by the three other Judges, Dampier, Bayley, and Le Blanc, that it was a vested indefeasible remainder in the second or other son of *B. F.* who should be born living an elder son; and therefore, as *B. F.* had four sons, of whom the second and third and the second and fourth respectively were in existence at the same time, but all, except the fourth, died in the lifetime of *B. F.* without issue, they held that the surviving son was entitled. And the grounds of their decision were, in substance, these: That the prevention of an union of the family estates was only the most probable of several possible motives. That the construction which would prevent such union, would prevent any family settlement of the estate during *B.*'s life. That if this construction were adopted, and the eldest son had died in *B. F.*'s lifetime, leaving issue; the second son would become an eldest son, without obtaining the eldest son's estate, and yet would thereby be excluded from the estate devised to the second son. Or, if

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[80]

the second son died, leaving issue, the provision intended for a second son's family, would go to the third son, or to another family. That the holding the remainder vested in *B. F.*'s second son as soon as he had two sons together in *esse*, would satisfy every word in the will, and, as far as they could be certain, every motive of the testatrix: for, as she had given the remainder to *F. S.* by name, and therefore, had given such remainder absolutely to him whom she found a younger son of *F. S.*, without guarding against the event of his becoming an eldest son; so it might fairly be inferred, that she meant to give the prior remainder absolutely to him who should first become the second son of *B. F.* And that this construction would fall in with the axiom, that no remainder is to be deemed contingent, which can be deemed vested; whereas the construing the remainder contingent, would contravene that axiom: and the construing it vested, but liable to be divested, would render it necessary to supply a whole clause, to give it a complete effect as a conditional limitation. The decision was affirmed by the Court of Exchequer Chamber; Richards, L. C. B., Gibbs, L. C. J., Dallas, J., and Borough, J., agreeing with the majority of the Judges in the Court of King's Bench; and Graham, B., and Wood, B., agreeing with Lord Ellenborough. Wood, B., said, that when the testatrix excluded the first, she meant the first born; when she excluded the eldest, she meant to exclude him who should answer the description of first or eldest at the time of *B. F.*'s death; the word eldest being a term which shifts in its application, according to the changes which may take place in a family. (*Ib.* 483, 482; *S. C.* 8 Taunt. 468. See § 201, 202.)

Observations The primary question in this case, was, To what time on *Driver v. Fyank.* did the words eldest and second refer; or, at what period

was a son to answer the character of eldest son, in order to be excluded, or of second son, in order to entitle him to take? Now, the words, in themselves, seem entirely ambiguous in this respect: they might mean eldest and second at the time of the birth of such second son, an elder son being then in *esse*; or they might mean eldest and second at the time of the death of *B. F.* How then was the ambiguity to be removed? Was it by calling in the aid of an ac-

[81]

See § 200-1. knowledge rule of construction, which requires that a remainder should be construed vested, rather than contingent; and by which the apparent object of the testatrix would be accomplished in certain events, though not in others, and without involving any of the mischiefs which might result from a contrary construction? Or, was the ambiguity to be removed, by resorting to an inference, not only that the apparent object was to a certainty the actual ob-

ject; but also, that it was the intent of the testatrix that such object should be accomplished, not merely in certain events, but in all other events, even in those in which the consequences that would follow; and the analogous ulterior limitation to *F. S.*, clearly showed that it was not intended to be carried into effect? It must surely be evident, that the ambiguity ought to be removed in the former way, or, in other words, that the judgment of the Courts of King's Bench and Exchequer Chamber was right.

Again, a testator devised his Stanton Drew estate to *G. A.*, *Adams v. Bush*, 6
for life; remainder to *G. A. A.*, first son of *G. A.*, for life; remainder, in strict settlement, to the issue of *G. A. A.*; re- *Bing. New*
mainder to *J. P. A.*, second son of *G. A.*, for life, remainder *Cases*, 164.
to the issue of *J. P. A.*, in strict settlement; with similar remainders to the other sons of *G. A.* and their issue. And he devised a moiety of his share in the manor of Timbury to *G. A.*, for life; remainder to the wife of *G. A.*, for life; remainder to the child and children of *G. A.*, other than and except an eldest or only son, in fee; and if their should be no such child or children, other than an elder or only son, or being such, all should die under 21, then, to such persons as should become entitled to the proceeds of the Hoxton Manor Farm. And he devised the Norton Manor Farm to *E. L.*, for life, and her children in tail; and, in default of issue, the estate was to be sold, and the money divided among the children of *G. A.*, other than and except an elder or only son. *G. P. A.* was the second son of *G. A.* at the testator's death; but at the death of *G. A.* he was the only child. It was held, however, that he took an estate in fee on his father's death.

The principle of avoiding mere conjecture as to the intention of preventing an union of estates, is also illustrated by a case where a testator devised to trustees and their heirs, in trust to receive the rents until *T. M.*, the second son of *T. S. M.*, should attain 21; and immediately after *T. M.* should have attained 21, to convey to the use of *T. M.*, for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons, in tail male. And, in default of such issue, or in case of the death of *T. M.* before 21, upon similar trusts for other younger sons of *T. S. M.* And there was a proviso, that in case any young son should become possessed of the estate at *P.*, then in the possession of *T. S. M.*, the devise or limitation directed should cease and become void or not take effect, and the persons next in remainder under the said limitations, should thereupon become entitled to the possession of the property devised by the testator. Sir W. Grant, M. R., held, that, on the authority of *Boraston's Case* and many others, *T. M.* took a vested remainder for life, after an estate in the trust-
[82]
Stanley v. Stanley, 16 Ves. 491.
See § 11 e., 111f., 159, 50, 52, 58, 759.

tees for so many years as his minority might last (16 Ves. 506;) and that on the authority of *Doe dem. Heneage v. Heneage*, 4 T. R. 13, *T. M.*'s only son, the first tenant in tail, became entitled under the proviso, notwithstanding the descent of the estate at *P.* on his father *T. M.*, and even though, at that time, *T. M.* had no son. For the testator had not said he meant to prevent the union of the two estates, as long as the law would permit; and the estate to trustees was the next; and they were capable of possession, and under the protection of their estate, the contingent remainders to the first and other sons of *T. M.* were to be considered as subsisting remainders, to prevent the second devisee for life answering the description of next in remainder. (*Ib.* 509.)

Stert v. Platell, 5 Bing. New Cases, 434.

In another case, a testator devised to *A. H.*, for life; remainder to trustees to preserve &c.; remainder to *R. H.*, son of *A. H.*, for life; remainder to trustees to preserve &c.; remainder to the first and other sons of *R. H.*, in tail male; with similar remainders to *A. D. H.*, another son of *A. H.*, and to his first and other sons. The will then proceeded thus: "and, in default of such issue, I devise the same premises unto such person, bearing the surname of *H.*, as shall be the male relation nearest in blood to the said *R. H.*, and to his heirs for ever." It was held that the interest under the ultimate limitation, vested at the death of the testator, in the person then answering that description; no particular time being pointed out, and the general rule requiring that a remainder should be construed to be vested, rather than contingent.

[83]

See § 200-1.

SECTION THE THIRD.

The Application of the Rule to Legacies and Portions apparently depending on Surviving Parents, as a Condition Precedent.

General Principles.

When the leaning in favour of vesting is peculiarly strong.

THE leaning in favour of vesting is of course 215 peculiarly strong where the opposite construction would exclude objects who have a strong claim upon the author of the instrument, or would exclude persons without any apparent reason, or for reasons which are apparently absurd.

It is so where a portion or legacy seems to depend on surviving parents.

This is the case where the interest in a portion 216 or legacy is *prima facie* made to depend upon the person interested surviving his parents.

"A gift by will, however," as a learned Judge(a) 217 has justly observed, "differs from the case of a

(a) Sir L. Shadwell, V. C., in *Tucker v. Harris*, 5 Sim. 549.

trust declared by a settlement; because, in the former, there is no supposition [founded in the nature and design of the instrument, or on any valuable consideration,] that any persons can be intended to take, except those who are described as takers." See § 241-244. Distinction between a gift by will and a trust by settlement.

218 Still, even in the case of a will, there is a strong antecedent improbability that it should really be intended that the survivorship should be requisite to the vesting, so that though the party may have attained to majority, and may in fact have married and founded a family, yet that he should be excluded from the testator's bounty, merely by the accidental circumstance of his dying in the lifetime of his parents or one of them. This, indeed, is a circumstance which, so far from constituting any reason for his exclusion, may form a peculiarly cogent reason why his estate should the rather be increased by the testator's bounty; for his premature decease may create a strong necessity for some additional means of support for the family he may have left behind him. Leaning against construing survivorship a pre-requisite, [84] is strong, even in the case of a will.

219 But in the case of a marriage settlement, there is not only this strong antecedent improbability, but there is also a violent presumption against the construing it to be necessary for the children to survive their parents, arising from the nature and design of the instrument, as one which was *prima facie* intended to make a provision for a family, and from the character of the objects, who are not volunteers, as in the case of a will, but purchasers for valuable consideration. And hence the leaning in favour of vesting without regard to this survivorship, is exceedingly strong in cases of portions under marriage settlements. But much stronger in the case of a marriage settlement. Thus—

Specific Rules.

220 I. Where, according to the terms of a marriage settlement, the raising of portions is made to depend on the existence of children or a child at the death of the parents, or one of them, as the case may be; and the words import a condition precedent, which not only renders it necessary that there should be children or a child then living, but apparently manifests an intent to confine the gift of portions to those children who should be in existence at that time; such words are construed not according to their spirit, but according to the letter; so that if there happens to be a child living at that time, the words of contingency, even allowing them to amount to a condition precedent, are regarded as satisfied; and not only is the child then living entitled to a portion, but also the representatives of those who died before, provided they lived till the other period to which the vesting was postponed. Where one child survives, and the words importing necessity of surviving are construed so as to admit others who did not survive. See § 13.

*Hope v. Lord
Clifden, 8
Ves. 498.*

[85]

The trusts of a term, limited by a marriage settlement, after a life estate to *E. B.*, the husband, and a term for securing a jointure, were declared by the settlement to be, in case there should be any children living at the decease of *E. B.*, or afterwards born, except the heir male, then, the trustees should raise 5000*l.* for the portions of all and every the children, except an eldest or only son, to be paid at 21, or marriage, which should first happen after the decease of *E. B.*; and if any of the younger sons should attain 21, or any of the daughters should attain 21, or marry, in the lifetime of *E. B.*, then, the portions should be paid within three months after the decease of *E. B.*, unless *E. B.* should direct the same to be raised in his life. Provided that, if any of the children entitled to the portions, should die, or become an eldest or only son, before his, her, or their portions, should become payable, the portions should go to the survivors: Provided also, that in case all the children entitled to portions, should die before any of their portions should be payable, then, the said sum, or so much thereof as should not be then raised, should not be raised, but should cease. There were four children; of whom *M.* married, and died in the lifetime of *E. B.*, leaving three sons. Lord Eldon, C., held, that *M.* took a vested interest. His Lordship observed, that the Courts, feeling it not to be a probable intention in a parent, that, though his child had attained 21, or come to marriageable years, and formed a family, yet, because that child dies in the parent's life, the descendants should have nothing, have thought themselves at liberty to manage the construction of the words, as they would not in the case of a stranger (6 Ves. 507); and that the cases authorized him to struggle with language for that purpose. (*Ib.* 509.) His Lordship added, in effect, that if the first words constituted a condition precedent, that condition had been fulfilled, for there were some children living at the death of the father; and even if there had not been any, still the case of *Woodcock v. The Duke of Dorset* would have been a direct answer to that objection. (*Ib.* 510.)

*King v.
Hake, 9 Ves.
488.*

[86]

In another case, there was a trust for raising portions, in case it should happen that the husband and wife should, at the death of the survivor of them, leave any child or children. Two sons survived both parents. Two others attained 21, but died in the lifetime of the surviving parent. Sir W. Grant, M. R., held, that they took vested interests; inasmuch as the contingency had happened on which the trust was to arise; and in that part of the clause which provided for the case of "more than one child who should live to attain 21," the word "child" was totally unqualified by any expression, restraining it to children who should survive their parents.

So, where a marriage settlement contained the following passage: "and from and after the decease of the survivor of them the said *P. W.* and *E.*, his wife, in case there shall be any child or children of their two bodies living, who shall be of the age of 21, or who shall after arrive at such age, born in the lifetime of the said *P. W.*, or after his decease; then, upon trust, that they the said trustees shall transfer 20,000*l.* unto such child or children of the said *P. W.* and *E.* his wife, at their respective ages of 21 years, in such proportions," &c. There were two children; a son, who survived his father, but died in the lifetime of his mother, after having attained 21; and a daughter, who survived both parents, and attained 21. Sir *W. Grant*, M. R., held, that the son was entitled to the sums which the mother in her lifetime appointed to him. He observed, that the condition in the first part of the clause was fulfilled, as there was a child living, who had attained 21, at the death of the survivor of both parents. And, as to the other part of the clause, the effect of it depended entirely upon the word "such," which, in other passages, was (as he considered) so absurdly and unmeaningly applied, that it was evident that the parties had no definite notion of the effect of its introduction. (3 V. & B. 88, 89.) And he remarked, that the condition of survivorship was confined to a survivorship of the wife in a preceding passage, and entirely dropped in another. (*Ib.* 91.)

221 II. And if, in the case supposed, there does not happen to be children or a child living at the death of the parents, or one of them, as the case may be; yet, if there is a gift of portions to the children generally, and not merely to such as should be then living; or if, in the clause of cesser, or in the limitation over, or in any other part of the settlement, there is any thing which would in itself render it in the slightest degree doubtful, whether it was really intended to confine the gift of portions to surviving children; in such cases the words of contingency are not construed as a condition precedent, but as merely expressive of one state of circumstances in which they are to be raised, without implying that they are not to be raised in any other.

Where no child survives, but words importing necessity of surviving are construed so as to admit those who did not survive. [87]
See § 13.
Estates were conveyed by marriage settlement to trustees and their heirs, in trust, after the decease of the husband, in case he should leave one or more daughter or daughters, younger son or sons, to raise 12,000*l.* for the portions or fortunes of such daughter &c., to be paid according to appointment, and, in default of appointment, at 21 or marriage. And it was provided, that in case the husband should think proper that any portion or portions of any such daughter &c., should be raised and paid during his lifetime, it should be lawful so to do. Then followed a proviso, that in case

Hongrave v. Cartier, 3 V. & B. 79.

Where no child survives, but words importing necessity of surviving are construed so as to admit those who did not survive. [87]

See § 13.
Powis v. Burdett, 9 Ves. 428.
See also *Perfect v. Lord Curzon*, 5 Mad. 447, 444.

of the death of any of the said daughters &c. before their portions should become payable, such portions should be paid to the survivors of such &c.; with a further proviso, that if there should be no such younger son &c., or all should die before their portions should become payable, then, no part should be raised, or if raised, it should be reinvested in land. There was only one younger child, who attained 21, but died in his father's lifetime: so that the contingency, on which, according to the express words, the trust was to arise, did not happen. Lord Eldon, C., upon the authority of preceding cases, held, that he took a vested interest; observing, that upon the other construction, if there had been six younger sons and seven daughters, and twelve had died, leaving families, those twelve families who had lost their parents, would have been without any provision, and the thirteenth child would take what probably was intended to be shared among all, at the age of 21, or the marriage of the daughters; (9 Ves. 434;) and that if the twelve parts had been raised and paid under the clause of advancement, yet, under the words "*such daughter*" &c. connected with the expression "*leave*," the thirteenth child would have a right to insist that what had been advanced was to be called back. (*Ib.* 435.)

Where no
child sur-
[88]
vives, and
none are ad-
mitted.

III. But if, in the case supposed, there does not 222
happen to be any children or a child then living,
and there is no direct gift to the children generally, but
merely to such as should be then living, and there is nothing
to render it in the slightest degree doubtful, whether it was
really intended to confine the gift of portions to surviving
children; there, no child who does not survive both pa-
rents, or one of them, as the case may be, will be entitled to
a portion.

Hotchkin v.
Humfrey,
2 Mad. 65.

Where a marriage settlement provided, that in case the
intended husband and wife should have a daughter or
daughters, or younger sons or son, that should be living at
the time of the decease of the survivor of them, the trustees
should raise a certain sum for the portions of such daughter
or daughters, or younger son or sons; the children who sur-
vived both parents were alone entitled.

Whatford v.
Moore, 7
Sim. 574;
S. C. 3 M.
& C. 270.

And in another case, Sir L. Shadwell, V. C., held, that
none were intended to take portions under the marriage set-
tlement, except those who should survive both parents; and
this decision was affirmed by Lord Cottenham, C. And,
indeed, it was a case in which there does not seem to have
been a single expression in the settlement to favour a con-
trary construction.

SECTION THE FOURTH.

The Application of the Rule to subsequent Interests, limited after Interests depending on a Condition Precedent.

222a . . . *THOUGH the vesting of a preceding interest is suspended upon a condition precedent, and such condition, according to the grammatical construction, may be fairly regarded as equally extending, but does not necessarily extend, to a subsequent interest in remainder; it will not be construed to extend thereto, unless there is some sufficient reason, independently of the doubtful grammatical construction, for thinking that it extends to the subsequent interest.(a)

CHAPTER THE THIRD.

OF THE CONSTRUING AN INTEREST TO BE ABSOLUTE RATHER THAN DEFEASIBLE.

SECTION THE FIRST.

A general Rule suggested, with the Reasons thereof.

223 It would appear to be a general rule, deducible from principle, and from actual decisions, though not enunciated by authority, that, in doubtful cases, an interest, whether vested or contingent, ought, if possible, to be construed as absolute or indefeasible, in the first instance, rather than as defeasible: but if it cannot be construed to be an absolute interest in the first instance, that, at all events, such a construction ought to be put upon the conditional expressions which render it defeasible, as to confine their operation to as early a period as may be; so that it may become an absolute interest as soon as it can fairly be considered to be so. For,

224 1. This would seem clearly deducible from the well-known rule, that conditions are odious, and of conditions shall be construed strictly; a rule which would appear to apply to those conditions which are termed in a preceding

(a) See *Napper v. Sanders*, Hutt. 118, as stated, *Fearne*, 223, 21; *Lethieulier v. Tracy*, 3 Atk. 774; *Amb. Rep.* 204, as stated, *Fearne*, 225; *Horton v. Whittaker*, 1 D. & E. 346, as stated, *Fearne*, 235.

See § 12-22. page mixed conditions, as well as to conditions which are simply destructive. For, if it applies to conditions subsequent which are simply destructive and upon which an estate is to be defeated, and made to revert to the heir, who is favoured by the law; it would seem to apply also to those conditions which are both destructive and creative, and upon which an estate is to be divested, and a new estate is to arise in favour of another person, by way of conditional

See § 148-9. limitation.

Leaning in 2. The person claiming under a prior limitation, 225
favour of pri- and his children, being of course the primary ob-
mary ob- jects of the grantor's or testator's bounty or consideration,
jects. and the persons claiming under the limitation ever being
[90] only secondary objects of such bounty or consideration; it
is of course reasonable to lean in favour of the primary ob-
jects, by construing their interest to be absolute in the first
instance, or as early as by fair construction it can be consid-
ered to be so, rather than to lean in favour of the secondary
objects, by construing the interest of the primary objects to
be defeasible.

Leaning in 3. The law favours the free uncontrolled use 226
favour of free and enjoyment of property, and the power of alien-
enjoyment ation; whereas the defeasible quality of an interest tends
and aliena- most materially to abridge both.

tion of prop- The following case may perhaps be not unaptly cited as
erty. in some degree connected with the general principles above
Weakeley d. mentioned. A testator, after giving his eldest daughter five
shillings, and five pounds to his second daughter *M.*, gave a
Knight v. leasehold to his youngest daughter *A.*; but if she should die
Rugg, 7 D. without having child or children, then he willed that the
& E. 322. premises should remain to *M.*, and, after her death, to her
children. *A.* had three children, who all died in her life-
time. It was held, that the word "having" did not mean
"leaving;" and consequently that the devise-over did not
take effect; because, otherwise, if *A.* had children who died
in her lifetime, leaving issue, the estate would have gone
from that issue to *Mary* and her issue; whereas it was the
general intention that the family of *A.* should be first pro-
vided for. *A.* was the favourite daughter of the testator,
the great object of his bounty.

SECTION THE SECOND.

The Application of the Rule to Bequests to a Class of Persons.

Whereanag. I. WHERE one aggregate sum of money is be- 227
ggregate sum queathed to the children of any person collectively,
is given to a as a class, without any limitation over on failure of issue of
person's such person, or some other clear indication of a contrary

intent(a), all the children, as well by a subsequent marriage children, and as by the marriage subsisting or in contemplation at the date there is no of the will, who are born at the period when the share or limitation shares of any one or more of them ought to be ascertained over on fail- and paid, are admitted to a participation in the fund. And ure of his is- it is immaterial whether that period be the death of the tes- sue, or other tator, or the death of a person taking a prior interest in the [91] fund, or the attainment of a certain age by the eldest of particular in- the children, or, in case payment is expressly postponed dication of till that period, the attainment of a certain age by the young- intention. est child.

228 But those children who are born after that period, are excluded; because it would be highly inconve-
 229 nient if the child or children whose share or shares is or are ascertained and paid, should be liable to refund a part of the money upon a mere uncertainty. Such
 230 a liability would, on the one hand, be a source of litigation, and often of fruitless litigation, where the children whose shares had been paid, had spent the money. And, on the other hand, it would so fetter the possession of the money, where they acted under a sense of their liability to refund a part, as to render the possession scarcely more desirable than the mere receipt of the income.

230a 1. In cases where *the period of payment was the death of the testator.(aa)—A testator gave legacies *Hill v.* in trust for such of the children of his daughter, *Sarah Hill, Chapman*, 1 as were then in existence, by name, to be transferred to the *Ves. Jun.* sons at 23, to the daughters at 21; provided, that if any of 405. his said grandchildren should die before their portions should be transferable or payable, their portions should belong to all the children of his said daughter living at their death. He then gave all the rest and residue of his estate and effects, whatsoever and wheresoever, in trust for all his grandchildren by his said daughter, to be applied for their benefit as aforesaid. And afterwards, by a codicil, he gave some annuities for life, and directed that 1000*l.* should be set apart, after his decease, to pay the same. A child of *S. H.* was born after the death of the testator, but before the death of the annuitants. Lord Thurlow, C., held, that that child took nothing, either in the residue, exclusive of the 1000*l.*, or in the 1000*l.*, after it had fallen into the residue on the death of the annuitants. His lordship said, that if he imputed to the testator a view of providing for all the children, he should

(a) See 1 *Rop. Leg.* 29, &c.

(aa) See *Roberts v. Hgman*, 1 B. C. C. 532, in note; *Heathe v. Heathe*, 2 Atk. 122; and *Coleman v. Seymour*, 2 *Ves. Sen.* 209; referred to 1 *Rop. Leg.* 34, ed. by White.

contradict a rule which had stood too long to be shaken, but which, when first raised, went *satis arbitrio*, because the intention might go to all possible children, as in marriage settlements; and to impute to him such a restrained intention, was rather a forced interpretation, and generally against the intention at the time. That it would be repugnant to say one part of the residue went one way, the other part another. That the whole inference which excluded the after-born child, was, the circumstance of a distribution being necessary, *ex vi terminorum*, upon the death of the testator, as admitted by the counsel for that child.

Davidson v. Dallas, 14 Ves. 576. And so, where a testator bequeathed to the children of his brother, 3000*l.*, to be equally divided between them; and if either of them should die before 21, their share to go to the survivors. Lord Eldon, C., held that this was an immediate legacy to the children living at the testator's death, in whom it vested at that time, with a limitation over, if either of them should die before, 21 to the survivors; and that the children born after the testator's death were excluded.

2. In cases where the period for payment was the death of the tenant for life. (b)—A testator gave the interest of the residue to his two sisters, for their lives; and, after their decease, the principal to be paid to their children, share and share alike; but whichever sister died before the other, then, the share which was so paid to her, should be paid to her children, in equal proportions; but, if such sister so dying should leave no children, then, the interest and produce to be paid to the survivor, for her life, as aforesaid. One sister died without children; the other had two children at the death of the testator, and two others afterwards. Lord Loughborough, C., said, that he could not control the general words by the strange expressions that followed; and that the property vested in all the children.

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Godfrey v. Davis, 6 Ves. Jun. 43. In another case, a testator, after giving several life annuities, directed, that the first annuity that should drop, should devolve upon the eldest child, for life, of *W. H.*; and he directed, that as the annuities dropped, their amount was to go to the increase of the annuities of the survivors; and that when the said annuitants were all dead, the whole property should devolve upon the heirs male of *P. F. W. H.*

(b) *Ellison v. Airey*, 1 Ves. Sen. 111; *Attorney Gen. v. Crispin*, 1 B. C. C. 386; *Congreve v. Congreve*, 1 B. C. C. 530; *Devisme v. Mello*, 1 B. C. C. 537, as stated, 1 Rop. Leg. 48—50. Mr. Roper also refers to *Graves v. Boyle*, 1 Atk. 509; *Haughton v. Harrison*, 2 Atk. 329; *Middleton v. Messenger*, 5 Ves. 136; *Pulsford v. Hunter*, 3 B. C. C. 417; *Ayton v. Ayton*, 1 Cox. 327; *Paul v. Compton*, 8 Ves. 375; *Tebbs v. Carpenter*, 1 Mad. 290; *Crone v. Odell*, 1 Ball & Beat. 449.

had no legitimate child at the death of the annuitant who died first. The Master of the Rolls held, that an afterborn legitimate child was not entitled. But this decision was grounded upon the plain intention of the testator, that unless there were a child of *W. H.* at the death of the annuitant, the annuity should accrue to the survivors; and that the heirs of *P. F.* should take on the deaths of all the annuitants, instead of waiting till the death of *W. H.*, as might be necessary if the other construction were allowed.

Again; a testator devised a copyhold estate, in trust to sell and apply the interest of the produce for *H. W.*, for life; and, after her decease, to divide the principal among the children of *T. W.* and *R. W.* And he bequeathed Bank stock, reverting to him on the death of *M. B.*, upon trust to make sale thereof, in case the same should be in his name at his decease, and if not, as soon as *M. B.* should die; and to apply the money equally among the children of *T. W.* and *R. W.* *H. W.* was dead, but *M. B.* was living. It was urged, that the testator intended the same persons to take both funds; and that the only mode of giving them to the same persons, was, by giving them to those only who were born before the testator's death, instead of distributing it upon the deaths of the respective tenants for life. Lord Eldon, C., admitted that the same persons were intended to take both funds, yet thought it impossible not to apply to the fund to be distributed upon the death of *M. B.*, the rule that must be applied to the copyhold estate; and that the distinction which was taken as to the life interest in the Bank stock not having been created by the testator himself, was not to be regarded.

Walker v. Shore, 15 Ves. 122.

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230c 3. In cases where the attainment of a certain age has been the period for payment. (c)—A testator gave the residue of his personal estate, in trust to apply the interest, or a sufficient part thereof, for the maintenance of all the children of *D. H.*, until they should severally and respectively attain 16, and then to transfer the principal to them when and as they should attain 16. Lord Loughborough, C., held, that those born after the eldest attained 16, were excluded on the ground of convenience.

Hoste v. Pratt, 3 Ves. 729.

In another case the period was the attainment of 21 by the eldest, or marriage, or the death of the child under 21, leaving issue; and Lord Eldon, C., said, that the rule of the Court required that all the children should take who come in esse before there is a necessity for determining the share of any child; that this rule had gone upon an anxiety to provide for as many children as possible with convenience.

Barrington v. Tristram, 6 Ves. 344. See *Blease v. Burgh*, 2 Beav. 221, stated § 313.

(c) *Gilmore v. Severn*, 1 B. C. C. 582, ed. by Belt; and *Prescott v. Long*, 2 Ves. Jun. 690; as stated, 1 Rop. Leg. 41, 42, ed. by White.

And therefore he held, that children by another husband, with whom the party intermarried after the date of the will, were entitled, though His Lordship said, his private opinion was, that the testator never thought of her marrying again; and though, according to that construction, the limitation over was too remote.

Whitbread v. Lord St. John, 10 Ves. 152.

Where a bequest was made in trust to pay to the children of *A.*, born or to be born, as many as there might be, at 21, or marriage; with a clause of survivorship; and a limitation over, upon the death of all before 21, or marriage; Lord Eldon, C., held, that, *ex necessitate*, those born after the eldest attained 21, were excluded.

Gilbert v. Boorman, 11 Ves. 238.

And where a residue was bequeathed to *A.*, and all the other children thereafter to be born of *B.*, at 21; Sir W. Grant, M. R., made a similar decree.

Clarke v. Clarke, 8 [95] Sim. 59.

And so where a testator bequeathed a fund in trust for *A.*, for life; and, after her death, in trust for all and every the children of *B.* and *C.* who should attain 21. Sir L. Shadwell, V. C., held, that all the children of *B.* and *C.* who were born before the eldest attained 21, though after *A.*'s death, would be entitled to a share on attaining 21; the learned Judge observing, that otherwise seven children might be born in the lifetime of the tenant for life, and then another might be born and live to attain 21; but the seven might die under that age, and then the only child who attained 21, would be excluded.

Hughes v. Hughes, 14 Ves. 256.

In another case, the period fixed for distribution of real and personal estate, was, the majority of the youngest grandchild; and all who were born before that time, and were then living, and the children of those who were dead were included, according to the express terms of the will.

Where a specific sum is given to each.

II. But "where a specific sum is bequeathed to each of the children, whether born or to be born, none are excluded. (d) For, in this case, the reason for excluding some of the class does not arise; because the sum which each child is to take, being fixed by the testator himself, it is never necessary to determine the number who are to take, in order to ascertain the share or shares of any one or more of them."

Where there is a limitation over in default of issue of the parent, or some other indication of

III. Again, "if there is a limitation over in default of issue of the parent, then even those who are born after the period for payment will be admitted, because it is in that case positively certain that the testator intended that all should take, however inconvenient such a construction might be; since, by the express words of the will, the fund is only to go over in default of issue

(d) See *Diffia v. Goldschmidt*, 19 Ves. 566.

- 233 of the parent.(c) The children, however, who are an intent that
born after that period, will not be entitled to by- all should
234 gone interest. And the same will be the case in take.
other instances where the testator plainly shows
his intention that all the children should take.

A testator gave his residuary personal estate, upon trust *Mills v. Nor-*
for the children of his two daughters, *E. M.* and *M. N.*, *ris*, 5 Ves.
equally, payable at 21, or marriage; with a limitation over [96]
upon failure of issue of *E. M.* and *M. N.* in their lifetime. 355.
Lord Loughborough, C., held, that, having regard to
the limitation over, a child who was born after the eldest child
attained 21, was to be admitted, but that such child was not
entitled to claim bygone interest.

In another case, a testator gave real and personal estate *Scott v. Earl*
to trustees to accumulate the rents &c., for twenty years after of *Scarbo-*
his decease, and, after certain payments, to stand possessed rough, 1
of the accumulated fund, in trust for all the children of *A.*, *Beav.* 154.
B. and *C.*, then born, or who should thereafter be born,
during the lifetime of their respective parents, and who, be-
ing sons, should attain 21, or, being daughters, should attain
21 or marry; and whether born or unborn, when any other
of them should attain the age or time aforesaid, and their
respective executors, administrators, or assigns. At the
expiration of the twenty years, there were several children
of *B.* who had attained 21, but *A.* and *B.* were still living,
In this case, both the accumulation and the vesting were
within the prescribed limits; the accumulation being con-
fined to 20 years from the testator's death, and the vesting
to a distinct period of 21 years from the expiration of lives
in being. The difficulty, as Lord Langdale, M. R., observed,
arose from this: that the will included children to be born
at any time during the lives of their parents, and yet directed
distribution at the end of 20 years from the testator's death,
when the parents were living, and might have more chil-
dren. And His Lordship observed, that had it not been for
the words "during the lifetime of their respective parents,"
he thought it would have followed from the cases cited, that
the words "to be born," would, for convenience, be restrict-
ed to grandchildren to be born before the period of distribu-
tion. That, in the principal case, however, he was of opin-
ion that the children of *B.*, who were living at the end of the
twenty years, took vested interests in their shares, subject to
partial divestment and diminution in the event of other ob-
jects coming into existence; and that until such divestment
or diminution, the children who had vested interests, were
entitled to the income of the accumulated fund.

(c) See *Shepherd v. Ingram*, Ambl. 448; and S. C. nom. *Gibson v. Rogers*,
1 Ves. Sen. 485, as stated, 1 Rep. Leg. 37.

SECTION THE THIRD.

The Application of the Rule to Devises and Bequests where there is a Limitation over in case of the Death of the Devisee or Legatee within a certain Time, or without leaving Issue or other Objects who might derive a Benefit through him.

Common cases where "or" is construed "and," in limitations of real estate.

Observations on this construction.

See § 706, 714.

See § 223-
[98]
226.

See § 206-
208.

I. *WHERE real estate is devised to a person and his heirs, or to a person indefinitely, and in case of his death under a certain age, or without issue, over; the word "or" is construed "and," so that the devise over may take effect in case the prior taker dies under the given age without issue, and not otherwise.^(a)

Every one must have observed how often the disjunctive "or" is inaccurately used for the copulative conjunction "and." Hence cases might naturally be expected to occur, in which the Courts might reasonably be called upon to construe the one for the other. And as regards the case above mentioned, it may be thought that this construction may have been adopted upon the notion that the limitations over on an indefinite failure of issue would be void for remoteness, so that the words "or without issue" would be inoperative unless "or" were construed "and." It may be urged, however, that this does not prove that the testator did not intend the estate to go over on an indefinite failure of issue, but merely, that if such was his intention, it is contrary to law. And as the limitation over would be capable of taking effect in the event of the death of the devisee or legatee under the given age, it would not be altogether inoperative and void in its original creation, even if "or" were not construed "and."

The principle of the general rule enunciated above, would appear to be the true principle of this construction; namely, the favour shown by the law to the free uncontrolled use and enjoyment of property, and the power of alienation, and the general leaning in favour of the primary objects of the testator's bounty. For, it has been said that it cannot be supposed that a testator would wish the estate to go over, to the exclusion of the issue of the prior taker, if he should die under the given age, leaving issue. And though perhaps it may be thought very questionable, whether it was politic and expedient to adopt this construction, where the

(a) Mr. Jarman, in his *Treatise on Wills*, p. 444, in addition to the cases stated below, refers to *Soulle v. Gerrard*, Cro. El. 525; *S. C. nom. Sowell v. Garrett*, Moore, 422; pl. 590; *Price v. Hunt*, Pollex, 645; *Barker v. Suretees*, 2 Str. 1175; *Walsh v. Peterson*, 3 Atk. 193; *Doe d. Burnsall v. Davy*, 6 Durn. & East, 35.

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16 East, 67. 21, or should leave no issue male or female, then he gave See also the same to his daughter, she being surviving, and her heirs male or female. But in case his son and daughter should both die, leaving no issue, then over to the testator's cousin. *Doe d. Herbert v. Selby*, 2 Bar. & Lord Ellenborough, C. J., said, that a multitude of decisions, such as *Fairfield v. Morgan*, 2 New Rep. 38; *Eastman v. Baker*, 1 Taunt. 174; *Denn v. Kemneys*, 9 East, 366, following *Sowell v. Garrett*, reported in Moore, 422; 2 Rol. Rep. 282, had established, that the word "or," in a devise of this kind, is to be construed as "and," to avoid the mischief, which would otherwise happen, of carrying over the estate, if the first devisee died under 21, though he had left issue. And Bayley, J., said, that the estate was to go over to the daughter, if the son died under 21 and without issue, and to the cousin, if the daughter died without issue.

Observations In this case, the terms of the devise over, as they stood, on *Right d. "or"* being taken in its natural disjunctive sense, constituted *Day v. Day*, both a conditional limitation, to take effect in the event of the son dying under 21, and a remainder, to take effect on his dying after 21, without issue. But this limitation over to the cousin showed that this was not the true construction, because that limitation was not to take effect if the son died leaving any issue, whether he died before 21 or afterwards.

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Where "or" is construed "and," in limitations of personal estate. II. The same construction is adopted where personal estate is bequeathed to a person absolutely, or, which amounts to the same thing, indefinitely. Personal estate, indeed, passes immediately to the executor or administrator, and not to the issue, and may be exhausted in payment of his debts; but, generally speaking, it is not exhausted, and the greater portion ultimately goes to the issue, so that they may be considered to be almost as much interested as if the property were real property, which would pass to them in the first instance.

Mytton v. Boodle, 6 Sim. 487. A testator bequeathed 500*l.* to A., if he attained 21; but if he should not attain that age, or die without leaving issue male, then over. A. attained 21; and Sir L. Shadwell, V. C., held, that he was absolutely entitled to the money, the clear intention of the testator being, that A. should have it if he attained 21, or if he died under 21, leaving issue male. —To support this construction, it must have been necessary to read "and should" for "or."

Hawkins v. Hawkins, 7 Sim. 173. Another instance of a somewhat similar construction occurred where a testator gave a sum of money to trustees, in trust only, and for the use and benefit of his adopted daughter [who was in fact his illegitimate child]; which sum he desired might be paid to her, and to be settled on her during her said life, at the time of her marriage; or in case she did not marry, then, the interest to be paid to her; and in the

event of her not marrying, *or* dying, then the money to go to his nephews. The daughter married, and died without issue. The counsel for the husband, as her administrator, said, that, after giving the money, for the use and benefit of his adopted daughter; and desiring it to be paid to her, he contemplated her marrying; and directed how the fund should be settled. That he meant, however, not to abridge her interest; but merely to protect her against her husband. That her death was spoken of as a contingency, and might mean dying in the lifetime of the testator; or the word "*or*" might be read as "*and*"; in which case, the gift over had not taken effect. Sir L. Shadwell, V. C., though he said that the latter words relating to the settlement, and those that preceded, were to be considered as one sentence; and that the testator meant by them, that, on the marriage of his daughter, a life interest should at all events be secured to her, yet held, according to the construction put upon the word "*or*" by the learned counsel; that the testator meant that his daughter's interest should cease "in the event of her dying unmarried."

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237a III. In consistency with the above construction, the Courts, of course, have refused to construe the copulative as a disjunctive, where it has been used in such limitations over.

Thus, where there was a devise over of a term, in case the prior taker should die an infant, unmarried, *and* without issue; the Court refused to construe "*and*" as "*or*"; and held, that the devise over depended on the happening of all three events.

"And" not construed "*or*," in such limitations.

Doe d. Everett v. Cooke, 7 East, 269.

And where there was a devise over of real estate, if the prior taker should die before 21, *and* without issue; the Court held, that the devise over depended on the happening of both events; Lord Ellenborough, C. J., and Le Blanc, J., observing, that this case was so far distinguishable from *Brownword v. Edwards*, that there the word "*and*" was construed "*or*" to prevent the working of an injury to the issue, namely, to a daughter, who, without such a construction, would have been without any provision: whereas, in the principal case, the limitation over was to other relations; and such a construction would work that very injury.

Doe d. Usher v. Jessop, 12 East, 288.

See § 68a.

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IV. This construction is adopted, where there is a devise to a person, when he attains 21, for life, remainder to his children, in tail, with a devise over, if he die under 21, or without children. (b)

Other cases where "*or*" is construed "*and*," in limitations

over on death under 21 or without children:

(b) *Husker v. Sutton*, 9 J. B. Moore, 2, as stated, 1 Jarman on Wills, 446.

Other cases of the same construction, [102] in limitations over on death within some other time, or without leaving some other object who might derive a benefit through the legatee. V. A learned author observes, that it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contingency, as in the case of a gift to *A.*, and if he die in the lifetime of *B.*, or without issue, then over; (c) or whether the event is leaving issue, or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband (d) or wife." (e)

Where "or" is not construed "and." See § 200-3. 187, 192-4. See Chap. XXIV. VI. But this construction is not adopted where real estate is devised to a person and the heirs of his body; and, in case of his death under a certain age, or without issue, then over; (f) because it is a general rule, that a remainder shall, if possible, be construed as vested, rather than contingent; whereas the construing "or" as "and," would be going out of the way to construe a remainder to be contingent, rather than vested; for the devise over is both a remainder and a conditional limitation. 240

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See § 216. 222. *The Application of the Rule to Portions apparently liable to be defeated by a Condition Subsequent, in case of the Children to whom they are given not surviving their Parents.*

Postponement of payment till after parent's death is a postponement of the actual possession only. I. WHERE portions are directed to be paid on the attainment of a certain age, or on marriage, if that event does not happen in the lifetime of the parent; but not till after the death of the parents, if such event does happen in his lifetime; the Courts regard the attainment of the age specified, or marriage, as the period when the portions are to vest in interest, if not in possession; inasmuch as the postponement to that period appears to be on account of the person of the children: and they regard the postponement till the parent's death, or some little time after, merely as a postponement of the actual possession; because, the postponement of the payment till that period seems only for the convenience of the estate, and the benefit of the parents or parent having a prior interest for life. 241

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(c) *Wright v. Kemp*, 3 Durn. & East, 70; *Denn v. Kemps*, 9 East, 366.

(d) *Weddel v. Mundy*, 6 Ves. 341.

(e) 1 Jarman on Wills, 466.

(f) *Woodward v. Glasbrook*, 2 Vern. 398, as stated, 1 Jarman on Wills, 448. See also Lord Hardwicke's observation in *Brownson v. Edwards*, 2 Ves. Sen. 243.

242. And if there is a clause of survivorship, providing for the case of any of the children dying, or a clause of cesser, or a limitation over, in case all of them should die, before their portions should become payable, the word "payable" is referred exclusively to the period of attaining the age specified or marriage, whenever it may happen, (a) unless the same word is used in another passage in such a way as clearly to refer to the death of the parents.

Word "payable" in a clause of survivorship or cesser or a limitation over, is referred exclusively to the age specified or marriage.

A testator gave property, in trust to pay the interest to *Hallifax v. R. H.*, for life, and, after her decease, to pay the principal to his nephews and nieces; the shares to be paid at 21, with survivorship, in case any of them should die before his or their share or shares should become payable. *Wilson*, 16 Ves. 168. Sir W. Grant, M. R., held, that the word payable referred most naturally to the period of 21 alone. And this decision was affirmed by the Lord Chancellor.

And so where by a marriage settlement, a term was created, and limited to trustees, upon trust (in case there should be no issue male of the marriage, and there should be a daughter or daughters at the time of the failure of issue male, or afterwards) by sale, or mortgage, or out of the rents and profits, to raise portions for such daughter and daughters, to be applied as thereafter mentioned; (that is to say) if there should be any such daughter or daughters, then, the sum of 20,000*l.* should be raised and paid as and for the portion or portions of such daughter or daughters; the same to be paid at 21, or day of marriage, which should first happen after the decease of *E. C.* (the father) and failure of issue male; and if any of the said daughters should attain 21, or be married, in the lifetime of *E. C.*, then, such portion or portions should be paid to such daughter or daughters, within six months after his decease. There followed a proviso, that in case all the daughters should die before any of their portions should become payable, then, the money, or so much thereof as should not then be raised, should not be raised, and then also such sum as should be then raised for or towards such portion or portions, should be paid unto the person next in reversion or remainder; and that no such sale or mortgage as aforesaid should be made until some or one of the portions should become payable. And it was provided, that in case there should be no such daughter or daughters, or, being such, all of them should die before any should be entitled to her or their portion or portions; then, the term should cease. The only issue of the marriage was a daughter

Fry v. Lord Sherbourne, 3 Sim. 243.

(a) *Jefferies v. Reynous*, 6 Bro. Parl. Ca. 398, 8vo. ed., as stated, 1 Rep. Leg. 536.

ter, who attained 21, and married, but died in her father's lifetime. Sir L. Shadwell, V. C., after remarking, that the event took place in which the sum for a portion was to be raised, namely, the failure of issue male, and after reviewing the cases, said, that he was compelled to hold, that where a portion is provided for a son on attaining 21, or for a daughter on attaining that age, or being married, and those events happen in the lifetime of the parent, the child, though it dies in the lifetime of the parent, has acquired an absolute vested interest in the portion; or, in other words, that the word "payable" means "vested." His Honour then observed, that one of the above clauses assumed, that though the daughters might not have arrived at the time when their portions would be payable, yet part of the portions might have been raised; and that it was quite clear that the parties did suppose that there was something in the antecedent part of the declaration of trust, which might make the portions payable in the lifetime of the father; and, accordingly, there was an express proviso, that no sale or mortgage should be made until some or one of the portions should become payable. If, however, the proviso for the ceasing of the term had been couched in such language, as that, notwithstanding the expression to which he had before alluded, the term had ceased, His Honour observed, that, in that case, there would have been an end of the question.—In a similar case His Honour construed the word "payable" in the same manner.

*Mocatto v.
Lindo*, 9
Sim. 56.

*Bright v.
Rowe*, 3 M.
& K. 316.

But where a married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave 2000*l.* subject to the life interest of her husband, to trustees, upon trust for the benefit of her children, to be equally divided between them; but in case the 2000*l.* should become payable before her children, being sons, should have attained 21, or, being daughters, should have attained that age, or day of marriage; then, in trust to invest and apply the interest for their maintenance and education; and when they should attain 21, or day of marriage, to pay to them their respective shares of the principal and unapplied interest; and in case any of the children should die before her, his, or their portion or portions of the 2000*l.* should become payable; then, the same should respectively go to the survivors or survivor. The testatrix left a son and two daughters, all of whom had attained 21 at her decease. The son, and afterwards a daughter, died in the lifetime of their father. The question was, whether the personal representative of the deceased daughter who survived the son, but died in the father's lifetime, was entitled to any and what part of the 2000*l.*; or, whether the whole vested in the other daughter who survived the father. On the one

hand, it was argued that the word "payable" was used in a sense equivalent to "vested"; and that, to say the least, there was not a clear, unambiguous intention to make the right of the children to their portions depend upon their surviving both parents. On the other hand, it was contended that the word "payable" clearly referred to the period at which both parents should have died, and was expressly distinguished from the provision for payment at 21 or marriage, which was only to take place [and which, in fact, could only take place] in case of the death of the parents before their children should have attained 21 or have been married. Sir John Leach, M. R., held, that the shares of the children vested at majority or day of marriage; and that the daughter, who survived the father, was entitled to the whole of the 2000*l.* by survivorship, except the moiety of the one third part or share of the deceased son which accrued to the deceased daughter who survived him but died in the father's lifetime. His Honour observed, that when a testator has unequivocally expressed an intention that a provision to be made for his children should depend upon their surviving both their parents, the Court must give effect to that intention, and could only lean to the presumption in favour of children, where the intention of the testator was ambiguously expressed; and that he could see no ambiguity in the principal case, but was clearly of opinion, that, by dying before their portions became payable, the testatrix meant dying in the lifetime of the husband; and that the shares of the children so dying were given to the survivors or survivor of them.

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It may be observed that the personal representative of the deceased daughter, in contending that the word "payable" was synonymous with "vested," and referred to the period of the children's majority or marriage, construed the word by the next antecedent contained in the next preceding sentence, which directed the trustees "to pay" the shares at majority or on the day of marriage. The daughter who survived the father construed it by referring to the first part of the will, where the very same word "payable" was used, and where it clearly did not refer to the period of the children's majority or marriage, but to an event antecedent to that period; the words being "in case the said sum of 2000*l.* should become payable before [the children] should have attained the age of 21 years or day of marriage." And as the word payable, in the first part of the will, clearly did not refer to the period of the children's majority or marriage, and could only refer to the death of the father; so, when the same word was used in the latter part of the will, it was to be understood in the same sense.

Observations
on *Bright v. Rowe*.

Torres v. Franco, 1 Russ. & M. 649. In a previous case, by articles of agreement made before marriage, stock was vested in trustees, upon trust to pay the dividends to the husband; for the joint lives of husband and wife; remainder to the wife, for life; and from and after her death, in case there should be any child or children of the marriage living at the time of her decease, then, upon trust for such of the said children as should attain the age of 21 years or be married; with a direction for maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such children or child then living, yet all of them should die under the age of 21 years, and unmarried; then, in trust for certain other persons. The wife survived her husband; and, at her death, no child of the marriage was living, but she had had a son, who after having attained 21 and married, died in her lifetime leaving issue. Sir John Leach, M. R., is reported to have said: "This case is to be decided upon the principle established in *Howgrave v. Cartier*, 3 Ves. & B. 79:— The gift over is not to take effect unless all the children die under age and unmarried. This is inconsistent with the clause which imports that a child to take must survive the mother: and where clauses are conflicting, the rational presumption is, that a child attaining 21 takes a vested interest." This decision, however, would seem questionable; for, the learned Judge appears to have been mistaken in stating that the gift over was not to take effect unless all the children died under age and unmarried. The limitation over was to take effect in either of two events; namely, in case the wife should die without leaving any child or children at the time of her decease; or, in case there should be one or more children or child then living, yet all of them (*i. e.* such surviving children) should die under age and unmarried.

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Observations on *Torres v. Franco*.

Words supplied, or the word "or" changed into "and."

II. Where there is, in terms or in effect, a limitation over, in case of the death of any of the children before their parents, or one of them, as the case may be; some words have sometimes been supplied, or the disjunctive "or" has been changed into the copulative conjunction "and," so as to confine the event of death to a dying under a certain age which is mentioned in another passage of the will, and at which the testator appears to have intended the children to take vested interests.

Clutterbuck v. Edwards, 2 Russ. & M. 577. A testator appointed a fund, after the decease of his wife, to his son, to be paid to him at her decease, if he shall then have attained 21; and in case his son should die before 21, and after the wife, he gave the fund to his, the testator's, brother; and in case the wife should outlive both the son and the brother, he gave it, after the wife's decease, to such of his brother's daughters as should then be living. The

son attained 21; but the wife survived both the son and the brother, who had daughters living at the wife's decease. Sir John Leach, M. R., and afterwards Lord Brougham, C., on appeal, held, that the representatives of the son, and not the daughters of the brother, were entitled to the fund. The Lord Chancellor said, "The question being with reference to the third clause, whether it shall be read in one or other of two ways, that is, as providing for the son's pre-decease, whether under or above 21, or as providing only for his pre-decease under 21; I read it, according to the general intention, in the latter way, thus: in case my wife survives my son under 21, and also my brother, then to my nieces." (2 Russ. & M. 587.) "The violence would certainly be great, of the other construction, cutting out the grandchildren of the testator in favour of his nieces, and making the interest which the son took depend upon a contingency wholly immaterial, namely, his surviving his mother—material, indeed, as to the term of payment, but immaterial as to the vesting of the estate—and to make the nieces take an interest merely because their uncle's wife had survived her son, though their father, the testator's brother, was only to take any interest in case the son died under 21." (Ib. 586.)

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In another case, a testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife, for her life; and to raise and pay to each of his sons, 2000*l.*, on their attaining 21; and to stand possessed of a like sum in trust for each of his daughters attaining that age; and to accumulate the surplus income during the life of his wife; and, after her death, to sell the property and divide the proceeds amongst his children on their attaining 21; and in case all the said children should die in the lifetime of his wife, or under 21, and without leaving issue, then, after his wife's death, to sell the property and divide the proceeds among certain other persons. It was argued, that none of the children were to take if they died without issue before the period of enjoyment; and that the words "and without leaving lawful issue" were to be applied to both members of the sentence. But Sir L. Shadwell, V. C., on the hearing of a demurrer, said, that it was clear that the testator did not mean the property to go over if his children attained 21, or if they died under 21 leaving issue; and that "or" ought to be read "and". And His Honour, on the hearing of the cause, was of the same opinion; and observed, that, by the first words, the gift to the children was made to depend on their attaining 21, whether they died in the lifetime of the wife or not. Without doubting the soundness of the decision, that the property was not to go over if the children attained 21, though they might afterwards die in the wife's lifetime, it may appear questionable.

Miles v. Dyer, 5 Sim. 435.

Observations on *Miles v. Dyer*.

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whether "or" ought to be construed "and" to support that construction. If the children should die without issue under 21, after the wife's decease, it was clearly the testator's intention, that the property should go over; yet, according to that construction, it could only go over if they should die in the wife's lifetime, under 21. Not that the construction was open to such an objection, so far as the case above mentioned was concerned; for the children had already attained 21. But the question may arise, on similar language in another case, where the children have not attained the age specified, and, in such case, it is humbly suggested, that instead of construing "or" as "and," the desired object may be gained by construing the words thus: and in case the said *A.* shall die in the lifetime of *A.*, or [at any other time] under the age of 21 years, and without leaving lawful issue. By connecting the words "and without leaving lawful issue" with both members of the sentence, these words "at any other time" may be fairly understood; and, in this way, the dying in the lifetime of *A.* might be confined to a dying under the age specified, and yet at the same time, the estate would be limited over in the event of death under that age, after *A.*'s decease.

Leaving construed into "having had" or "having."

Marshall v. Hill, 2 Mau. & Sel. 608.

III. And where vested interests in a fund are given to children at a certain age; but there is a limitation over in the event of their parent dying without leaving any child or children; the word "leaving" is construed as "having had," or "having."

A testator devised to *J. M.* and his son or sons, limited as aforesaid [i. e. to *J. M.*, for life; remainder to his first and other sons]; and, if *J. M.* should die leaving no son or sons, as aforesaid, then over. It was held, that *J. M.* took an estate for life, and *W. C. M.*, his eldest son, a vested indefeasible remainder; Lord Ellenborough, C. J., observing, that "leaving" meant "having had."

Maitland v. Chalk, 6 Mad. 243.

And where a testator, after giving vested interests in stock to his daughter's children at 21, directed, that, in case his said daughter should die without leaving any child or children of her body lawfully begotten, or, leaving any such child or children, and such only child or all such children should die before 21, then, that the stock should be transferred to the testator's next of kin who should be living at the death of the longer liver of them his said daughter and her said children so dying before 21. The daughter had two children, who attained 21, and died in her lifetime. Sir John Leach, V. C., held, that the word "leaving" was to be construed as "having."

Where the children who do not sur-

IV. But where the gift of payment is postponed till a certain period, and there is a limitation over in case there should be no child living at the death of the

parent; there, it would seem that the portions either do not vest at that period, in the parent's lifetime, or they vest de- nothing. feably, liable to be divested, so that the representatives of a child who dies after such period; but in the lifetime of the parent, will take nothing, unless this construction can be avoided simply by supplying the word "such."

A limitation ever of this kind occurred in the case of *Schenck v. Legh*, 9 Ves. 300. And Sir W. Grant, M. R., said, that if there was any thing equivocal; if the event was the death of all the children before the portions were payable, he could so construe that by reference to the two periods as to make it consistent with vesting at 21 or marriage. But there the contingency was so plain, that notwithstanding the authority of *Woodcock v. The Duke of Dorset*, he doubted whether he should be justified in new-moulding that proviso so as to qualify it in that manner. (9 Ves. 312.) But it was unnecessary for the Court to decide the point. (Id. 313.)

CHAPTER THE FOURTH.

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PRESENT VESTED INTERESTS, SUBJECT TO A TERM FOR YEARS, DISTINGUISHED FROM VESTED AND CONTINGENT REMAINDERS, AND FROM SPRINGING INTERESTS.

245 An interest of freehold duration, which is limited A freehold after, and only preceded by, a term for years, may after a term be designated a remainder in relation to the prior term for may be years, so far as regards the possession or beneficial interest. called a remainder, so For, as the termor has the possession, with or without the remainder, so exclusive beneficial interest, for the period of his term, the far as regards the person to whom the freehold is limited, may truly be said the possession, with or to have the remainder or remaining part of that possession sion, with or or beneficial interest which was parted with or devised by without the the person who granted or devised the term and freehold, beneficial interest. and of which the termor has the first part under such grant or devise.

246 But, an interest of the measure of freehold, lim- But it is not ited after, and only preceded by, a term for years, a remainder, is not a remainder at all in the ordinary sense of the word properly so remainder, when used with reference to a freehold interest. called; For, it is not a remainder as regards the seisin, property, or See § 159, ownership. As, in the case supposed, there is no other pre- 46-7, 50, 52, ceding interest than a term for years; and, as a term for 58, 60, years is a mere right extending to the possession, with or

without the exclusive beneficial interest, and not a portion of the seisin, property, or ownership; it follows that the freehold interest cannot be said to be a remainder, remnant, residue, or remaining portion of the seisin, property, or ownership.

but is either a present vested interest, subject to a term; or else a spring-

[112] ing interest.

See § 111e.

See § 45-48, 50.

See § 117-124a, 127a.

Where a freehold after a term is a present vested interest, subject to a term;

See § 111e.

The truth is, that (setting aside cases of augmentative limitations) an interest of the measure of freehold, limited after, and only preceded by, a term for years, is, in regard to the seisin, property, or ownership, either a present vested interest, subject to a chattel interest, operating by way of exception out of the freehold, or seisin, property, or ownership, and by way of suspension of one or more of its ordinary concomitants or incidents, namely, the possession, with or without the exclusive beneficial interest, for the period of the term; or else it is a springing interest, which is good, if limited by way of use or devise, though void, if limited by deed at common law. And,

I. If a freehold interest is limited to a person in being and ascertained, to take effect on the certain regular expiration of a term for years, in possession, without being preceded by any other freehold interest, such freehold interest is a present vested interest, subject to the term, as regards the possession, with or without the exclusive beneficial interest.

For, in such case, the freehold interest is only postponed until the expiration, and for the sake of, a prior chattel interest; and as such prior interest does not extend to the seisin, property, or ownership, but only to the possession, with or without the beneficial interest; there is no reason to suppose that any thing but the possession, with or without the beneficial interest, was intended to be postponed.

See § 75a, 77-78a, 88, 89.

See § 75.

See § 245-6.

See § 189.

See § 75-77, 87-8.

That such a freehold is a vested interest, either present or future, no one will dispute. If it is a future vested interest, it must be either a remainder or a reversion. But we have seen that it is not a remainder, as regards the seisin, property, or ownership; and it is obvious that it is not a reversion. And, therefore, it must be a present vested interest, though subject to the preceding term.

— where it is limited on the effluxion of years;

The most simple illustration of this occurs in cases where the freehold interest is limited to take effect on the effluxion of the given number of years of which the term consists: as, where land is limited to *A.* for 21 years, and then to *B.* for life.

— where it is limited on the dropping of a life or lives.

But, the same rule applies, where the term is rendered determinable by means of a special or collateral limitation, on the dropping of a life or lives; and it is for so great a number of years that there is not a com-

mon possibility of the life or lives enduring beyond it; and the freehold interest is limited to take effect on the dropping of the life or lives; as, where land is limited to A. for 99 years, if B. so long live; and, on the death of B., to C. for life. For, in such case, the freehold interest is as much limited to take effect on the certain expiration of the term, as if it had been limited to take effect on the effluxion of the given number of years; because, the dropping of the life or lives is an event which must happen within the given number of years constituting the term, and is an event on which the term must cease.

253 *It must be admitted that freehold interests limited after, and only preceded by, terms for years; subject to a special or collateral limitation, are called remainders by the great authority upon the learning of contingencies; and that there are decisions stated by him, (a) in which freehold interests so limited were regarded as remainders.

But, the real question, in each of these cases, was, whether the interest was a vested interest, and not whether it was a vested remainder; and, therefore, though it was assumed in these cases, as it is assumed by Fearn, that the interest was a remainder, in some sense; yet, all that these cases can fairly be regarded as establishing, is, that the freehold interest in question is a vested interest, and not that it is a vested remainder, in regard to the seisin, property, or ownership. Even admitting it to be the fact, which, however, does not appear in the reports, that the Court itself regarded the freehold interest as a remainder, in regard to the seisin; still, that construction was extra-judicial, and one into which, as such, the Court might easily have fallen, from not perceiving, or from forgetting for the moment at least, the distinction above stated between a remainder in relation to the possession, with or without the exclusive beneficial interest, and a remainder in regard to the seisin, property, or ownership.

And admitting that the illustrious author by whom these cases are referred to, assumes that a freehold limited after, and only preceded by, a term for years, is a remainder, in the ordinary sense in which the word is used with reference to freehold interests; such an assumption would only present us with an instance of a similar oversight to that pointed out by the eminent editor of the former editions, in the introduction to the work, and an additional, and a painful, though perhaps a salutary proof, of the fallability even of an oversight.

(a) See Fearn, 20—27, and *Napper v. Sanders*, Hutt. 118; *Beverley v. Beverley*, 2 Vern. 131; and *Penhay v. Hurrell*, 2 Vern. 370; as there stated.

A similar re- the most learned, accurate, and profound. And mark applies a similar remark applies to a passage in one of 254 to Butler. the notes of that eminent editor himself, who mentions, as an example of the first kind of contingent remainder, the case of land "given to *A.* for 21 years, if *B.* shall so long continue at Rome, and if he quit Rome during the term, to *C.* in fee;" (b) though, independently of the reasoning at the commencement of this chapter, that learned individual might have known, that, according to the propositions advanced by *Fearne* and assented to by himself, the freehold interest so limited, was not a contingent remainder, seeing that, according to those propositions, "wherever an estate in contingent remainder, amounts to a freehold, some vested estate of freehold must precede it," (c)

Where a free- II. But, where a freehold interest is limited. 255 hold after a term is a after, and is only preceded by, a term for years; and it is contingent on account of the person; or it is limited springing in- to take effect only on a contingent determination of the term, interest; by means of a special or collateral limitation, or on some See § 34-42. event unconnected with the original measure, and the regular expiration thereof; in such cases, the freehold interest is a springing interest of the second, third, 256 127a. fourth, or fifth kind, in regard to the seisin, property, or ownership, and is good, if limited by way of use or devise, though void if limited by deed at common law. As, if land is devised to *A.* for 21 years, and then to an unborn son of *B.*, in fee; or to *A.* for 99 years, if *C.* shall so long continue at Rome; and, on the return of *C.* from Rome, then to *B.*, in fee; or to *A.* for 99 years; and, on the death of *A.*, then to *B.*, in fee.

—where it is limited on the effluxion of years, and in other cases.

And so, where the term is rendered determinable, by means of a special or collateral limitation, on the dropping of a life or lives, and it is for so few years, that there is a common possibility of the life or lives enduring beyond it, and the freehold interest is limited to take effect on the dropping of the life or lives. (d) For, in such case, the freehold interest is in fact limited on the contingent expiration of the term; because the dropping of the life or lives is an event which may not happen before the term has already expired by effluxion of time. 257

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(b) *Fearne*, 5, note (d.) fifth paragraph.

(c) *Fearne*, 281.

(d) See *Fearne*, 21—24, in connexion with the observations made on the opposite case, § 248—254.

CHAPTER THE FIFTH.

FIRST EXCEPTION FROM THE FIRST CLASS OF CONTINGENT REMAINDERS, FORMED BY THE USUAL LIMITATION TO TRUSTEES FOR PRESERVING CONTINGENT REMAINDERS.

258 "At first view," says Butler, "it may appear that the usual limitation to trustees for preserving contingent remainders, is a contingent remainder of the sort first mentioned by Mr. Fearn: In cases of this description, the estate is conveyed to the use of *A.* for life; and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of *B.* and his heirs, during the life of *A.*, in trust for *A.*, and to preserve the contingent remainders; and after the decease of *A.*, to the use of the first and other sons of *A.* successively; in tail male. Here, the preceding estate may determine by one of two modes; *A.*'s forfeiture of his life estate, or *A.*'s decease. The estate of the trustees is to take effect in the first event, and is not to take effect in the second. The remainder to the trustees may therefore appear to be of that sort which is contingent. This point was fully considered in the case of *Smith v. Dormer v. Purkhurst*, 18 Vin. 419; 4 Bro. Cas. Par. p. 353. In that case, the judges determined, that the remainder was not a contingent, but a vested remainder."^(a)

Butler does not seem to have been satisfied with the decision: at any rate he does not offer to evince its soundness; but merely states the fact that, *ita lex scripta est*. Fearn; however, has gone so far as to attempt to show that the limitation in question is strictly and properly a vested remainder.

It is with the most unfeigned deference that the writer of these pages ventures to question the justness of the decision, when founded in any other principle than that of necessity, most especially as it has received the sanction of one who was as remarkable for subtlety of discrimination and soundness of judgment, as for the lucid, eloquent, and masterly style in which all his ideas are expressed. But the author has less hesitation in differing from the opinion of the judges, than he otherwise should, from the consideration that a contrary decision would, in the language of the Lord Chief Justice, have "overturned all the settlements for two hundred years last past;"^(b) and therefore, admitting that they really thought that the decision to which they came was upon principle a sound decision, yet their minds must have been under the influence of an almost irresistible bias; a

(a) Fearn, 6, note (d).

(b) Willes Rep. 339.

circumstance which is quite sufficient to remove that violent presumption which must have otherwise existed in favour of the conclusion to which they arrived. But it is far from clear, that all, or most of them, or any of them, except Lord Chief Justice Willes, who endeavoured to rest the decision upon principle, were of opinion that the decision was any thing more than a matter of mere imperative necessity. For the Lord Chief Justice, after alluding, as above mentioned, to the dreadful consequences of a contrary decision, unequivocally declares, "If therefore I could not make this consistent with the rules of law, though I humbly apprehend I plainly have, I should rather choose to put a construction on these words, contrary to the rules of law, than overturn many thousand settlements, according to this maxim, founded in the best reason, *Communis error facit jus*, and *Ut res magis valeat quam pereat*." (c) And with respect to the support which has been given by the learned author, who is the great authority on the subject of contingent interests, it can scarcely be doubted but that his sentiments would have been of a far different character, had he not been blinded by that wholesome prejudice in favour of judicial opinions, which is not only the result of a proper modesty, but also the necessary concomitant of profound and extensive learning.

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Our author, immediately after instancing the remainder in question, admits, that, as to its taking effect in possession, it depends entirely on a contingent determination of the preceding estate, by forfeiture or surrender. But he introduces the case by saying, that "if the uncertainty of taking effect in possession, should form any part of our notion of a contingent remainder, such a principle would scarcely fail to mislead us in every case of the least doubt." (d)

See § 170-
188.

Now, though it is very true that a vested remainder may be uncertain of taking effect in possession, as well as a contingent remainder; yet nothing can be further from the truth than the supposition, that the uncertainty of possession, in both cases, is of the same kind, or that both are equally uncertain of actual possession. A vested remainder, as we have already seen, does not strictly depend on any other uncertainty than that of its enduring beyond the preceding estate; whereas, a contingent remainder does strictly depend on a contingency irrespective of its own duration. And hence, a contingent remainder is doubly uncertain; being uncertain in respect of some contingency collateral to itself, as well as uncertain in regard to its own duration. Were it not so, indeed, the distinction between them would be merely verbal. It is humbly submitted, then, that the uncertainty of taking effect in possession, except that kind

(c) Willes Rep. 339.

(d) Fearn, 217.

of uncertainty which is connected with its own duration, *should* form a part of our notion of a contingent remainder: in fact, it flows from the very same fundamental distinction as that which is commonly taken between a vested and a contingent remainder. The existence, in the former, of a present, absolute, and legally transferable right to the possession, whenever the preceding estate may determine, and the non-existence and uncertainty of that right, in the latter, does indeed constitute the difference between them, from which, according to the principle of definition adopted by Fearn, they receive their denominations of vested and contingent. But that, as we have already seen in another place, is itself founded in another and more tangible distinction; namely, the non-existence, in the one, and the existence, in the other, of a contingency irrespective of its own duration, on which the enjoyment strictly depends. And from this fundamental distinction, the further difference necessarily arises; namely, the certainty of possession, in the one, (subject to any such chattel or other interest collateral to the seisin, property, or ownership, as extends to the possession,) and the uncertainty of it in the other, apart from the consideration of the certainty of their enduring beyond the preceding estate.

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It is admitted by our author, that the remainder in question, as to the actual possession, entirely depends on a contingent determination of the preceding estate: but, in the instance before us, it is held that the *right* of possession is not in contingency, but in actual existence. But where is the foundation of the distinction between this case, and the first class of contingent remainders entirely depending on a contingent determination of the preceding estate, in which the right of possession is contingent, as well as the possession itself? If the remainder, in each case, depends entirely on a contingent determination of the preceding estate, what ground have we for maintaining, that the remainder is only uncertain as to the actual possession, in one case, though it is uncertain, both as to the right of possession, and to the possession itself, in the other?

In order to discover this, we seem to be directed to the following description of a vested remainder, under which, it is truly said, the limitation in question clearly falls: "Wherever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person in *esse* and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder, such remainder is vested."(e)

(e) Fearn, 217.

If every remainder which falls under this definition is a vested remainder, then all the three first classes of remainders, which are previously termed contingent, are in reality vested. This is manifest from the very examples by which the descriptions of these remainders are illustrated; and there is nothing in the descriptions themselves, which would prevent the remainders they refer to, from falling under the above definition of a vested remainder. Thus, even where the remainder depends entirely on a contingent determination of the preceding estate itself, the preceding estate may be "limited so as also to determine on an event which certainly must happen;" as in the identical case, where *A.* makes a feoffment to the use of *B.*, till *C.* return from Rome, and after such return of *C.*, then to remain over in fee; for, by limiting to *B.* generally, *A.* gives him an estate which certainly must determine at his decease, if not previously determined by the return of *C.* So in the second and third classes, where the contingency is collateral to the expiration of the preceding estate, it is evident that such estate may be limited to determine on an event certain; as in the very cases which are selected by Fearn, where a lease is made to *A.* for life, remainder to *B.* for life, and if *B.* die before *A.*, remainder to *C.* for life; or where a lease is made to *J. S.* for life, and after the death of *J. D.*, the land to remain to another in fee.

And as to the last requisite, "that the preceding estate may by any means determine before the expiration of the estate limited in remainder," that is common to every remainder which is not absolutely void in its creation; and therefore, it is conceived, does not serve to render the above definition of a vested remainder, any the more distinctive and precise.

If then the courts had adopted the above description of a vested remainder, the subtle and abstruse learning to which the present Essay relates, would have been involved in the greatest uncertainty, inconsistency, and confusion.

To approximate as closely as possible to the construction of that description, without falling into its loose and dangerous generality, the true statement would appear to be this: That "wherever the preceding estate is limited so as to determine on an event which certainly must happen; and the remainder" is capable of vesting in possession *on such event, without requiring the concurrence of any contingency to perfect its capacity of taking effect at that particular period*; and it "is so limited to a person in *esse* and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder; such remainder is vested." For, to render the remainder vested, if it is legal, it must be capable of taking

effect in possession (subject as aforesaid) on the certain expiration of the preceding estate, though it may also be capable of taking effect on a contingent determination. For, what conceivable difference can it make in the nature of the remainder, that the preceding estate is to determine on an event certain, if that remainder is totally incapable of taking effect on such certain determination of that estate? Surely, the remainder must be in the very same predicament as it would be, if the preceding estate had had no such capacity of determination. Nor must the concurrence of any contingency be requisite, that a remainder may be completely capable of taking effect at that particular period, when the preceding estate is sure to expire; for then the remainder would be a contingent remainder of the second or third class.

After showing that the limitation in question comes expressly within the terms of his description of a vested remainder, our Author adds, that "as this conclusion corresponds with the authorities in point, it may fairly be considered as an instance of the justness of that distinction from which we can thus immediately derive it." (f) Here, we may plainly discover in what way he was betrayed into the inconsistency at which the foregoing observations are pointed. Influenced by a laudable reverence for authority, he evidently framed such a definition as might coincide with views which had received so high a sanction; he forcibly warped his own original sentiments, so as to make them accord "with the authorities in point."

What, in this particular instance, was the value of their opinion, the reader will speedily determine, as well from the quotations already made from the report of the case, as from the following observations.

In delivering the unanimous opinion of the Judges, before the House of Lords, in affirmance of the judgment of the Court of King's Bench, Lord Chief Justice Willes said: "We think there are but two sorts of contingent remainders, which do not vest; 1st, where the person to whom the remainder is limited is not in *esse* at the time of the limitation; 2dly, where the commencement of the remainder depends on some matter collateral to the determination of the particular estate." (g) The first of these of course answers to the fourth class of contingent remainders, according to Fearn's distribution, and the second obviously includes the second and third of his classes. But, where are those that, in the words of our author himself, depend entirely on a contingent determination of the preceding estate itself? The very kind of contingent remainders to which the limitation

(f) Fearn, 218.

(g) Willes Rep. 337.

in question appears to belong, are entirely omitted. The learned Judge^(k) has no idea of the existence of such contingent remainders. How then can we wonder at his denying that the remainder in question was a contingent remainder? And, what worth can we attach to his argument? *Debite fundamentum fallit opus.*

But the learned Judge, in order "to enforce" what he had said, makes an observation which only serves as an additional evidence of the imperfect state of his acquaintance with the subject under discussion. "Will any one," he asks, "say that anything can descend to the heir, that did not vest in the ancestor? So that if nothing vested in the trustees, the limitation to them and their heirs is nonsensical. And yet this word 'heirs' has been put in every such limitation for 200 years last past."⁽ⁱ⁾ The answer to this is to be found in the pages of Fearné himself, from which we learn, that "a contingent remainder, executory devise, or other executory interest of inheritance, *does* descend to the heirs of the person to whom it is limited, if he dies before the contingency happens, unless his attaining a certain age, or existing at some particular time, subsequent to the period when he died, constitutes or by implication enters into; and makes a part of, the contingency itself; on which such interest is intended to take effect."^(k)

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In conclusion, the learned Judge puts this case: "*A.*, tenant in fee, grants an estate to *B.*, for 99 years, determinable on his life; supposing *B.* outlive the term, or surrender, or forfeit, no one, I believe, will say but that *A.* may enjoy the estate again. If so, a contingent freehold was in him during the life of *B.*, for it could not be in *B.*; because he had only a chattel interest; and it could not be in any one else;—and if it were in *A.*, it must be a vested interest, for it was never out of him; and if *A.* had a contingent freehold during the life of *B.*, no one can say but that he might grant it over; and if he do, it must be of the same nature as it was when it was in *A.*, and consequently a vested freehold. And this case I have put, is expressly held to be law in Co. Lit. 42 a; in *Cholmley's Case*, 2 Co. 51 a; and in the Year Book of Edw. the III., which is there cited."^(l)

Now taking it for granted, that, in applying the terms vested and contingent so indiscriminately to the same interest, he only uses the term contingent in relation to the actual enjoyment, the fact that *A.* had a vested interest, can-

(k) In the ninth page, Fearné observes, that "contingent remainders appear to have been generally distributed into three kinds only, namely, the three last specified in the above division of them."

(i) Willes Rep. 338. (k) Fearné, 364—5, 552—65. (l) Willes Rep. 339.

not be disputed; but nothing can be inferred from this, to prove that the limitation to trustees to preserve &c. is strictly and properly a vested remainder.

As *A.* granted only a chattel interest to *B.*, without making any further disposition of the land, the freehold and inheritance of course remained in him in its original state; and was therefore a vested interest; and if *A.* afterwards granted over the freehold and inheritance to *C.*, it would still be a vested interest. The mere transfer of it into other hands, could not change it into a contingent interest; for, as it was originally sure to vest in possession, so it continued to possess a certainty of possession, since there was still a period certain to arrive, namely, the death of *B.*, or the expiration of the 99 years, at which it must ultimately take effect in possession, though it might possibly take effect at a previous time, in consequence of the forfeiture or surrender of *B.*'s estate.

And if the subsequent grant to *C.* had not been of the entire inheritance, subject to the term, but yet had been of an estate for the life of the grantee, "and such estate had been expressly limited, or had apparently been intended to take effect, on the death of *B.*, as well as on any anterior contingent determination of *B.*'s estate, the interest granted to *C.*, would be vested,^(m) because it would be sure ultimately to take effect in possession, if it lasted till the certain expiration of the preceding interest, or in other words, if *C.* survived *B.*, and did not previously surrender or forfeit his estate.

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But if *A.* had merely granted over an estate during the life of *B.*, to commence upon, and only upon, a contingent determination of *B.*'s estate, in *B.*'s lifetime, which is the only one of the three hypotheses that is in any way analogous to the limitation to trustees to preserve contingent remainders, this subsequent interest, though derived out of the vested interest of *A.*, would have been a contingent interest. For, in that case, instead of being sure to take effect at a period certain to arrive, namely at the death of *B.*, or the expiration of the 99 years, such subsequent derivative interest would have no other connexion with such a period than this; that if such interest should have already taken effect, it must at that period inevitably expire; or if it should not have already taken effect, it must then for ever cease to have any capacity of taking effect. In regard therefore to the commencement of possession, and the existence of the right of possession, this subsequent interest must entirely depend on the chance of some anterior contingent determi-

(m) See § 259.

nation of the preceding estate; and consequently it must be a contingent, instead of a vested interest.

See § 46-7, 50, 52, 58. The possibility, it must be observed, which *A.* had, of having the land before the death of *B.*, was not a distinct preceding interest or portion of the seisin, property, or ownership, whether vested or contingent, but a mere possibility of an earlier possession, annexed to what, in relation to the possession, would be commonly said to be his reversion in fee; or, to what, in relation to the seisin, property, or ownership, and more strictly speaking, was a present vested interest subject to a term.

See § 111e.

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And hence, though the subsequent grant of *A.* could not operate as a transfer of a mere possibility to strangers, contrary to the rule of the common law, yet it was not a transfer of an ancient vested interest, but a creation of a new interest out of a vested interest, that is, out of the freehold and inheritance remaining in him subject to the term first created. And if an interest were necessarily vested, because derived out of a vested interest, we should never have heard of such a thing as a contingent remainder.

It is humbly submitted that enough has been said, to prove beyond a doubt, that the judgment above cited, is defensible upon no other ground than that of imperative necessity; upon no other principles than those which are expressed in the maxims so strongly urged by the Chief Justice, *Communis error facit jus*, and *Ut res magis valeat quam pereat*. When the question lies between the validity of thousands of settlements, on the one hand, and the inviolability of an abstract principle, on the other; we may well be warranted in making an exception; when we can do so without derogating from the general operation of the rule in such a manner as to produce mischiefs far more serious than those we desire to avoid. To the decision itself, then, no objection can justly be urged, so far as it concerns the principal case. The point that is here contended for, is this—and it is one of the utmost moment—that that decision should not be allowed to affect the general doctrine; that the limitation in question should on no account be viewed as a proper specimen from which an accurate definition of a common vested remainder may be collected; that it should not be considered as disaffirming, but merely as constituting a solitary exception to, the general rule before proposed—that a vested remainder does not, and a contingent remainder does, strictly depend on a contingency irrespective of its own duration; and consequently, apart from the relative uncertainty of its duration, and subject to any chattel or other interest collateral to the seisin, property, or ownership, a vested remainder is certain, whereas a contingent remainder is not certain, of taking effect in possession or enjoyment.

CHAPTER THE SIXTH.

SECOND EXCEPTION FROM THE FIRST CLASS OF CONTINGENT REMAINDERS.

259 I. ALTHOUGH a remainder, so far as regards the express words of its limitation, may depend entirely and simply (a) on a contingent determination of the preceding estate; yet, in the case of a will, if it is morally certain that it was intended to take effect either on the certain expiration, or on a contingent determination, of such estate, whichever shall first happen; it will be allowed to do so, and, therefore, will be construed a vested remainder. Where a remainder limited on a contingent determination of the preceding estate, may take effect on the certain expiration thereof.

260 Thus, ^b where a testator has devised to his wife, for her life, if she shall so long continue his widow; and, in case she marry, to A. in fee; the courts have held that the remainder-man is to take either on the death of the tenant for life, or on her marriage; and have therefore construed the limitation to be a vested remainder. (δ) And this interpretation is clearly just. In wills, the intention, so far as it is consistent with the rules of law, ought to be carried into effect; and the testator certainly intended that A. should take in either event; because, it is impossible to discover any reason why A. should be the object of the testator's bounty, in case the particular estate should determine by the marriage of the tenant for life, if he were to have nothing, in case it determined by her decease; since her marriage could be a ground, neither for the testator's disliking and disinheriting the heir at law, nor for his desiring to benefit A.; and, therefore, no reason can be drawn from the difference in the events themselves, why A. should take in one event more than in another. [127]

261 II. But a remainder, which is expressly to take effect on a contingent determination of the preceding estate, will not be allowed to take effect on the certain expiration of the preceding estate, unless it is morally certain that such was the intention of the testator. Where a remainder can only take effect on the expiration of the preceding estate.

And, therefore, ^c where the devise was to A. for life, remainder to his first and other sons in tail; on condition that he and his issue male should assume a particular name; and in case he or they refused, then, that devise to be void; and, in such case, the testator devised the lands over. A. survived the testator, complied with the condition, and then

(a) See *Jordan v. Holkman*, Amb. 209; as stated, *Fearne*, 240.

(b) *Luzford v. Cheeke*, 3 Lev. 125; *Raym.* 427; referred to, *Fearne*, 5, note (d), and stated, *Fearne*, 239; *Gordon v. Adolphus*, 3 P. C. Toml. ed. 306, as stated, 1 *Jarman on Wills*, 731.

died without issue; and it was held in B. R., on a case from Chancery, and ultimately in the House of Lords, that the limitation over did not arise.(c) In this case, the contingent determination of the estate, namely by the non-assumption of the name, was so improbable, that the existence of an express limitation over in that event, could afford but a slight ground for supposing that the person to whom it was made, was also intended to take on the certain expiration of the estate by failure of issue.

CHAPTER THE SEVENTH.

SECTION THE FIRST.

Certain Cases of Vested Remainders, and the first, second, and third sorts of Contingent Remainders, and the seventh kind of Springing Interests, distinguished from Conditional Limitations.

The grand distinction between a remainder and a conditional limitation.

See § 148-9, 159, 160.

We have already seen that the grand distinction between remainders and conditional limitations, is, that a contingent remainder is limited to take effect in possession, or enjoyment, or in both, after the regular expiration of the preceding estate; whereas a conditional limitation is limited to take effect in that manner before the particular estate has filled up the original measure of its duration, so as to operate in defeasance thereof, instead of by way of remainder after it. To exemplify this distinction the more clearly, and to enable the student to apply it with certainty to the more difficult cases, the following rules and examples may here be given.

I. Where a subsequent interest depends on the determination of the regular estate.

I. Where the subsequent interest depends on a condition or contingency which is inserted, as a regular special or collateral limitation, in the clause by which the preceding estate is created, and, therefore, forms one of the original bounds to the quantity of that estate; there, the subsequent interest is a remainder,(a) if the preceding interest does not carry the fee; or, such subsequent interest is a by force of a springing interest of the seventh kind, if the preceding interest does carry the fee. For, instead of curtailing the pre-

(c) *Ambler v. Donelly*, 8 Vin. Ab. 221, pl. 21, affirmed in Dom. Proc. 5 B. P. C. Toml. ed. 254; as stated, 1 Jarm. on Wills, 780.

(a) See Fearn, 10, note (A).

ceding estate, it is not to take effect in possession, till an event or collateral limitation upon which the preceding estate would have expired, even if it had been followed by no other interest. And, in case the event upon which the subsequent interest is limited, is a contingent one, and such subsequent interest depends entirely on that event, it is a contingent remainder of the first class. As, where an estate is limited to the use of *A.* and the heirs of his body, till *C.* returns from Rome, or if *A.* and the heirs of his body shall continue to be Lords of the Manor of Dale; and after *C.*'s return, or on *A.* and his issue ceasing to be Lords of the Manor of Dale, (within the period prescribed by the rule against perpetuities,) then, to the use of *B.* in fee. See § 34-8, 159, 117, 126, 184. See § 706.

264 II. And where the subsequent interest depends on a condition or contingency, which is not inserted as a regular special or collateral limitation, in the clause by which the prior interest is created; (§ 94—8) still, if it is subjoined to such clause, so as to be capable of being connected with and construed a part of it, as an irregular special or collateral limitation; (§ 99) in such case, if the preceding interest does not amount to the fee, the subsequent interest is a remainder. (§ 159) And if it entirely depends on the contingency forming such limitation, it is a contingent remainder of the first class. (§ 184) But if it is also capable of taking effect on the certain expiration of the preceding estate, it is a vested remainder. (§ 183) *If the preceding interest, however, does amount to the fee, the subsequent interest is a springing interest of the seventh kind. (a) See § 117, 126, 165. See § 706.

265 Thus, if, as it has been previously observed, a devise is made to *A.* for life, on condition that he do not marry *C.*, with remainder to *B.*; this is construed as if it were to *A.*, until he shall marry *C.*; and then, or upon death, to *B.*; (b) and the subsequent limitation is a 41. See § 34, 38,

266 vested remainder. This proviso, when viewed apart from the limitation over, is strictly a condition subsequent. But it is not construed as such; because if the heir of the deviser had entered in case of a breach thereof, his entry would have defeated the remainder, as well as the particular estate, though the condition was never intended to defeat the remainder; because, by entry or claim, the livery made upon the creation of the estates was defeated. (c) See § 12, 15-19. [130]

(a) See *Fulmerston v. Steward*, cited Cro. Jac. 592; as stated, *Fearne*, 395.

(b) *Burton's Compendium*, § 829. See also *Scatterwood v. Edge*, as stated, *Fearne*, 237.

(c) *Butler's note*, Co. Litt. 203 b(1). *Burton's Compendium*, § 828; *Fearne*, 261, 270, 381, note (a).

- See § 14. Nor is the proviso a mixed condition, with a con- 267
 See § 148-9. ditional limitation limited thereon. It may perhaps
 See § 149a. be urged, that as conditional limitations are admissible in
 devises, it should rather be construed as if it were to *A.* for
 life, but if he marry *C.*, then the land shall immediately go
 to *B.*; in which case, *B.* would take by way of conditional
 limitation, instead of by way of remainder. But this con-
 See § 196-7. struction would be at variance with the general rule, where-
 by a limitation shall be construed as a remainder rather
 than as an executory devise. Besides, in that case, *C.*
 would not take in remainder after *A.*'s death, as he would
 according to the other construction, and as it would seem to
 be intended that he should; and this would be at variance
 with another general rule, that an interest shall be construed
 See § 200-9. to be vested, rather than contingent.
 "If such a sentence were contained in a deed, it 268
 has been thought that it would be construed as a
 condition subsequent, but as merely ineffectual and void.(d)
 But the better opinion would seem to be that such a sentence
 would be construed as an irregular special limita-
 See § 14-19. tion, even in a deed. "Though strict words of 269
 condition," says Blackstone, "be used in the crea-
 tion of the estate; if, on breach of the condition, the estate
 is limited over to a third person, and does not immediately
 revert to the grantor or his representatives, (as if an estate
 be granted by *A.* to *B.*, on condition, that, within two years,
B. intermarry with *C.*, and on failure thereof, then to *D.* and
 his heirs,) this, the law construes to be a limitation, and not
 a condition."(e) It must indeed be admitted, that the rea-
 son given by the learned Judge for this construction, is
 founded in a mistake or oversight, when he adds, that "if it
 were a condition, then, upon the breach thereof, only *A.*
 and his representatives could avoid the estate by entry, and
 [131] *D.*'s remainder might be defeated by their neglecting to
 enter;" whereas *D.*'s interest, as we have seen, would
 See § 266. equally be defeated by the very entry itself, as much as by
 the neglecting to enter. Yet, the doctrine itself, that the words
 in question constitute a limitation, seems to be perfectly cor-
 rect. And it would also seem clear, that, by such a limita-
 See § 24, 26, tion, the learned Judge meant a limitation in the original
 34. sense of a limit or bound, and not a conditional limita-
 See 148-9. tion. For, the words would be void as a conditional limita-
 See § 149a. tion; because a conditional limitation could only be by
 way of use or executory devise. And, even if the grant
 mentioned by Blackstone had been by way of use, yet

(d) Burton's Compendium, § 828.

(e) 3 Bl. Com. 155. See also Shep. T. 124, note (16).

the construing the words to be a conditional limitation, would have been at variance with the rule for construing a disposition to be a remainder, rather than an executory interest not by way of remainder. There are two differences, indeed, between the case put by Blackstone, and the preceding case. In the first place, the proviso mentioned by Burton, is an irregular special limitation, amounting in effect to a *direct* regular limitation; namely, to a gift to *A.* for life, until he marry *C.*; and upon the death of *A.*, or upon *A.*'s marriage with *C.*, then to *B.*; while the proviso mentioned by Blackstone is an irregular special limitation, capable, without doing violence to the words, of being resolved into an *indirect* limitation; namely to a grant to *B.* for life, *B.* intermarrying with *C.* within two years; and in default, &c. And secondly, in the clause in Burton, the remainder does not, while in the clause in Blackstone, the remainder does, in terms, depend on the breach of the condition. But these differences do not seem to constitute any material distinction between them, so far as the present question is concerned. Nor, upon principle, does it appear at all necessary or consonant to a sound and enlightened interpretation, to adopt a stricter construction in the case of a deed, than in the case of a will, as regards the point under discussion.

270 III. But, where the subsequent interest depends on a condition or contingency that is not inserted, as a regular special or collateral limitation, in the clause by which the preceding estate in possession or in remainder, is created, (*f*) nor so subjoined to such clause, as to be capable of being connected with it, as an irregular special or collateral limitation, so as, in either case, to form one of the original bounds to the quantity of interest (§ 34-43); and the words require an immediate transfer of the seisin, property, or ownership, to the person entitled to the subsequent interest, as soon as such condition or contingency shall happen or be fulfilled; there the subsequent limitation is not a remainder. (*g*) Nor is it good, at the common law, in any other way. (*h*) For, if the condition were allowed to operate as a condition subsequent, so as to defeat the preceding interest, it would defeat the subsequent interest at the same time; and therefore, if the instrument takes effect at common law, the condition, and the subsequent limitation dependent thereon, must be construed as void. But, if the limitations are by devise or by way of use, the condition

See § 196-9.
See § 269.
See § 265.
See § 39.
See § 41.
See § 39.
See § 42.
[132]
interest depends on the determination of the origin of the prior interest by force of a mixed condition, and such subsequent interest is not a remainder; § 159, 160. nor is it good at the common law in any other way, See § 12, 15-19, 266.

(*f*) See Fearn, 10, note (*h*). See also *Cogan v. Cogan*, Cro. Eliz. 360; as stated, Fearn, 263.

(*g*) *Ib.*

(*h*) See resolution in *Colthirst v. Bejushin*, Plowd. 23; as stated, Fearn, 263.

but it may be good, if by way of use or devise, as

an interest will then be good as a mixed condition, and the subsequent under a conditional limitation will be good as a conditional limitation. (i) § 14, 20, 148—9a.

tation. To illustrate these points, we may observe, that 271

Illustrations. if, in the case put by Blackstone, the grant were 271
See § 269. to *B.*, on condition, that if within two years he do not intermarry with *C.*, then to *D.* and his heirs; this, it is conceived, would be construed as a void condition. For, the words which specify the event on which the estate is to go over, form, with the words carrying the estate over, but one undivided sentence; so that the words specifying the event, are not capable of being dis severed from the words carrying the estate over, so as to be connected with the preceding

See § 26, 34-42. words creating the prior estate, and thereby be construed to mark out the original limits of that 272

[133] estate. And this view is supported by a passage in Sheppard's Touchstone, where it is said, that "if a lease be made to *J. S.*, on condition that if such a thing be or be not done, that the land shall remain to *J. D.*, or that *J. D.* shall enter; in this case *J. D.* shall never take advantage of this condition." (k)

But if the limitation, instead of being at the common law, were by devise, (l) or if it were a grant to *A.*, to the use of *B.*, on condition, that if, within two years, *B.* do not intermarry with *C.*, then to the use of *D.* and his heirs; this would be good as a conditional limitation. 273

See § 148-9. And, if the contingency were not introduced by the technical words of a condition subsequent, 273a
See § 18, 19. namely, "on condition," or "provided," or "so that," but by the words "and if," then the subsequent interest to *D.* and his heirs might have been good as a remainder. (m)

For, IV. Where the subsequent interest depends on 274
IV. Where the subsequent interest depends on an event which, instead of being inserted in, or capable of being connected with, the clause by which the prior interest is created, is independent of the measure of that estate; (§ 34—43) but the words merely import an intention that on the occurrence of the event a present right of future possession or enjoyment, or both, should accrue to the party entitled to the subsequent interest; or, in other words, that such interest should then vest in right; in such

(i) See Fearn, 10, note (h).

(k) Shep. T. 153.

(l) See *Sheffield v. Lord Orrery*, 3 Atk. 282; as stated, Fearn, 239. But See Lord Hale's remarks in *Lady Ann Fry's Case*, 1 Vent. 203, as cited, Fearn, 239, which, however, must be regarded as inaccurate.

(m) See *Colthirst v. Bejushin*, Plowd. 23; as stated, Fearn, 263.

case, the subsequent interest is a contingent remainder of the second or third class. (§ 79—81, 159, 185—6.)

275 Thus, "where land is limited to the use of *A.*; and if *C.* should die in *A.*'s lifetime, then, after *A.*'s decease to *B.* and his heirs; the limitation to *B.* is a remainder, and not a conditional limitation; because, the interest limited to *B.* is not to take effect in possession or enjoyment, but merely to vest in right, on the death of *C.* in *A.*'s lifetime. During the joint lives of *A.* and *C.*, it is a contingent remainder; and on the death of *C.* in *A.*'s lifetime, it does not vest in possession, but merely becomes changed into a vested remainder, which continues, as before, to be expectant on the regular expiration of the particular estate by the decease of *A.*(*n*) And so if land is leased to one for life, and if such a thing happen, then to remain to *B.*(*o*).

interest, and is a contingent remainder, capable of afterwards becoming converted into a vested remainder. Illustrations. See § 148-9.

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SECTION THE SECOND.

Practical Suggestions connected with the Distinctions in the First Section.

277 WHEN the practitioner is desirous of making a prior interest defeasible on a particular contingency, and of causing a subsequent interest to arise on the same contingency; it may seem to him immaterial, whether he accomplishes this general end by making that contingency the subject of a special or collateral limitation to the prior interest, (§ 44—42) and causing the subsequent interest to arise on the same contingency, as a condition precedent, (§ 43, 13) by way of contingent remainder, or of a springing executory interest; or whether he makes that contingency the subject of a mixed condition, and causes the prior interest to be defeated, and the subsequent interest to arise, on such contingency, by way of conditional limitation. Or, it may appear doubtful to him, which of these two modes is the best. Now, *apart from any other grounds of preference* which other legal consequences may suggest for the one mode rather than the other, it may be observed,

There are cases where it may seem doubtful in what way a prior interest should be determinable, and a subsequent interest be created. See § 159, 117. See § 14. See 148-9.

278 I. That if he is desirous of annexing a determinable quality to the prior interest, for the sake of determining such prior interest on the contingency specified, irrespectively of the design of creating another interest in its room, and he is desirous that such prior interest should cease on that contingency, whether the subsequent interest should be capable of taking effect or not; then, the contingency should be made the subject of a special or collateral limita-

I. Where the prior interest should be determinable by force of a special limitation, and the subsequent inter-

(*n*) See Fearn 10, note (*h*).

(*o*) Fearn 263. And *Colthirst v. Brjushin*, Plowd. 23; as stated, Fearn 263.

est be limited by way of remainder. See § 34-42. See § 13, 43. See § 159. See § 117, 126, 165.

tion to the prior interest, and the subsequent interest should be limited to arise on such contingency, as a condition precedent, by way of contingent remainder, in case the prior interest does not carry the fee, or of a springing executory interest of the seventh kind, in case the prior interest does carry the fee.

II. Where the prior interest should be determinable, and a subsequent interest be limited to arise on the fulfilment of a mixed condition.

Illustrations.

II. But if he is desirous of annexing a determinable quality to the prior interest, for the sake of creating another interest in its room on the contingency specified, and he would not wish the prior interest to cease, if the subsequent interest intended to be created in its room should be incapable of taking effect; then, he should make that contingency the subject of a mixed condition, and cause the prior interest to be defeated, and the subsequent interest to arise, on such contingency, by way of conditional limitation. (See § 14, 148—9.)

These suggestions may be illustrated by the following examples: If an estate be devised to *A.* 280

and the heirs of his body, till he becomes possessed of a certain other estate; and on his becoming possessed of such estate, then, to *C.* for life; there, if *A.* becomes possessed of the other estate, the first estate will cease by force of the direct special limitation formed by the words "till he become" &c., even though *C.* be dead, in whose favour alone the property was to go over, by virtue of the contingent remainder to him. Whereas, if an estate be devised to *A.* and the heirs of his body; but, if he become possessed of a certain other estate, then to *C.* for life; there, notwithstanding it should happen that *A.* had become possessed of the other estate, still, the first estate would not cease, by force of the mixed condition formed by the words "but if he become" &c. unless *C.* were alive, in whose favour alone it was to go by virtue of the conditional limitation. For, in this case, there is nothing to cause it to cease, as to *A.*, but that which was to cause it to go over; and as there was no one to whom it could go over according to the terms of the devise, it could not cease as to *A.*

CHAPTER THE EIGHTH.

CERTAIN CASES OF ABSOLUTE AND DEFEASIBLE VESTED INTERESTS, DISTINGUISHED FROM SPRINGING INTERESTS, AND FROM THE SECOND, THIRD, AND FOURTH CLASSES OF CONTINGENT REMAINDERS.

SECTION THE FIRST.

Cases where an Uncertain Event is made a part of the Description of the Devisee or Legatee.

281 I. WHERE real or personal estate is devised or I. Where an bequeathed to such of the children, or to such child uncertain or individual as shall attain a given age, or the children, &c. event forms who shall sustain a certain character, or do a particular act, part of the or "be living at a particular time,(a) without any distinct original de- gift to the whole class, immediately preceding such restric- scription. tive description; so that the uncertain event forms part of See § 282- the original description of the devisee or legatee; in such 309. case, the interest so devised or bequeathed, is necessarily contingent, on account of the person. For, until the age is attained, the character sustained, or the act performed, the person is unascertained; there is no person *in rerum natura*, answering the description of the person who is to take as devisee or legatee.

A testator devised his estates at *S.* and *H.* to trustees, in *Dufield v.* trust, in case there should be but one son of his daughter *Dufield*, 1 who should attain the age of 21 years, for such son, his heirs *Dow &* and assigns for ever; and in case there should be two or *Clark*, 268. more sons who should attain the age of 21, then, in trust for the second of such sons, his heirs and assigns for ever; and in case there should be no son who should attain the age of 21 years, then, in trust for such of the daughters (if any) as should attain that age, or, before that, be married with consent of the trustees, her heirs and assigns for ever. And, after directing his trustees to convert the residue of his real and personal property into money, and invest the produce in the funds; the testator directed his trustees, by and out of the rents, issues, and profits of the said estates, and by and out of the part or share of and in the said stocks,

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(a) *Reeves v. Brymer*, 4 Ves. 692; as stated, 1 Rep. Leg. 509, ed. by White. See also *Bennett v. Seymour*, Amb. 521; as stated, 1 Rep. Leg. 509. And See *Denn. d. Radclyffe v. Bagshaw*, 6, Durn. & East, 512; as stated, *Fearne*, 246, note (h); and § 350.

funds, and securities, and the dividends, interest, and annual proceeds thereof, to which any child or children of his daughter should be *presumptively* entitled, pay and apply, for the maintenance and education of any such child or children, in the meantime, and until his, her, or their share or portion, shares or portions, should become payable, such yearly sum and sums as to the trustees should seem meet. And, by a codicil, revoking that part of his will which directed the sale of his residuary freehold property, the testator directed, that the son of his daughter who should first attain the age of 21 years, should, on attaining such age, change his name for that of *Elwes*; and he devised to such son, on his attaining the age of 21 years, and changing his name to *Elwes*, all his freehold property &c. [meaning that directed by the will to be sold, and what he had subsequently acquired,] and his heirs and assigns for ever. The testator's daughter had one son and four daughters, infants, at the time of the testator's decease; and afterwards a second son was born. The decree of the Vice-Chancellor declared, that, under and by virtue of the will, *G. T. W. H. Duffield*, as the only son of the testator's daughter at the time of the testator's death, took, upon the testator's death, a presently vested equitable estate in fee, in the estates at *S.* and *H.*, subject to be divested by his death under age, or by the birth of a second son; and that, upon the birth of *Henry Duffield*, the second son, the said equitable estate of the said *G. T. W. H. Duffield*, was divested, and the said *Henry Duffield* took a vested equitable estate in fee in the said estates, subject to be divested in the event of his dying, or becoming neither the second nor only son, before he attained the age of 21 years; and that, under and by virtue of the codicil, the said *G. T. W. H. Duffield*, upon the testator's death, took a presently vested legal estate in fee in all the testator's freehold property (except the said estates at *S.* and *H.*) subject to be divested, in case of his death under age; but without prejudice to the question, how far such estate might be affected by his not changing his name on attaining his majority. The case was carried by appeal from the Vice-Chancellor to the House of Lords, in the first instance; and it was there decided, in consonance with the unanimous opinion of all the Judges, 1. That the estates at *S.* and *H.* vested in a second or only son, on his attaining 21, and not before; or, in case of failure of such issue, in a daughter or daughters, on her or their respectively attaining that age, or marrying with consent of the trustees, and not before. 2. That the testator's other freehold estate vested in the son who should first attain 21, on his attaining that age, and not before. 3. That until these estates vested, the rents and profits derived from them passed to the testator's heir at law,

the residue of the testator's estate not being devised to any particular person. 4. That, as to maintenance, there being two sons infants, the trustees should execute the power, by applying part of the rents and profits of the premises first devised, for the maintenance of the second of such sons, during his infancy; and in case such second son should die an infant, the elder son being an infant and an only son, the trustees might apply part of the rents and profits for such only son's maintenance, during his infancy, and whilst he continued an only son; and that, in case, after the death of such second son in his infancy, the testator's daughter should have a third son born during the infancy of the first, the power of the trustees to apply any part of the rents and profits to the maintenance of the first son, would cease, and they should apply part of the rents and profits for the maintenance of such third son; and that, supposing there was an only son, and a daughter of the testator's daughter, unmarried, and an infant, the trustees would not have the power of applying any part of the rents and profits for the maintenance of such daughter during her minority. Lord Chief Justice Best, who delivered the answers of the Judges, observed, that it was impossible to say that the words of that will did not import conditions precedent; that the estates were not given to any particular children by name, but to such children as should attain the age of 21 years; and until they had attained that age, no one completely answered the description which the testator had given of those who were to be devisees under his will; and, therefore, there was no person on whom the estates could vest. (1 Dow & Clark, 314.) It had been argued from the words "presumptively entitled," that the persons so entitled took a vested interest. (*Ib.* 304.) But his Lordship, as well as Lord Eldon, said, that those words showed that they did not take a vested interest; for, as the former remarked, a presumptive title was only a possibility; a presumptive heir, one who will be the heir, if no one having a preferable claim be in existence at the time of the death of the person to whom the presumptive heir stands in that relation. (*Ib.* 315.) With regard to any general motives that might induce a leaning towards one construction rather than another, the Lord Chief Justice observed, that the Judges were always inclined to decide that estates were vested, because, among other reasons, "the rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them." (*Ib.* 311.) But "the state of the affairs of this family," he added, "will not be sooner settled by the artificial contrivance of vesting and divesting the estates, than by keeping them con-

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See § 13.

tinent until a final vesting of them can take place, agreeably to the disposition made by the testator. How can it be said that the affairs of a family are settled by vesting an estate in an eldest son, and divesting when a second is born; then vesting it in the second, and divesting it on the birth of a third son and death of the eldest; and by again vesting it in a daughter; when there are no sons, and divesting it again on the birth of a son?" (*Id.* 312.) His Lordship cited the case of *Stephens v. Stephens*, as precisely in point.

*Tucker v.
Harris*, 5
Sim. 538.
[140]

And so where a testator gave 5000*l.* to trustees, in trust for his daughter *E.*, for life, for her separate use; and after her death, in trust to apply the interest for the maintenance of all her children as should be living at her death, during their minorities; and, on their attaining 21, in trust to transfer the same equally between them. But if *E.* should die without leaving any such child; or leaving such, if such child, or all such children, should happen to depart this life before attaining 21; then, to transfer the same unto such children of his son *F.*, or of his daughters *S.* and *M.*, as should be living at the death of *E.* without issue, or of the last of such issue under 21. One of the daughters of *E.* attained 21, but died in *E.*'s lifetime. Sir L. Shadwell, V. C., held, that the deceased daughter of *E.* took no interest. It was argued for her administrator, that as no person was to take under the gift over, unless they were living at the death of *E.* without issue, there was no gift over except on a general failure of issue of *E.*; and that the case was within the principle of *Perfect v. Lord Curzon*. But the Vice-Chancellor observed, that a gift by will differs from the case of a trust declared by a settlement; because, in the former, there is no supposition that any persons can be intended to take except those who are described as takers. That the words "without issue" referred to the event before described in the gift over, namely, that of the daughter dying without leaving any such child; and that the words "or of the last of such issue under 21," referred to the other event described in the gift over by the words "or leaving such, if such child, or all such children, should happen to depart this life before attaining 21." And that this was manifest from a gift of another sum, where the testator, in using the word "issue," clearly referred to the children of *E.*; and not to issue generally.

II. Where an uncertain event forms an independent super-added description.

II. But where a testator devises or bequeaths 282
real or personal estate to a class of persons, "or such of them as shall be living" &c., "or the survivors," so that the circumstance of being alive at a particular time, forms an independent, superadded, restrictive description, (instead of forming part of one and the same original description, and therefore of necessity rendering the interests

contingent, as in cases falling under the last rule, where a devise or bequest is made to such of a class of persons as shall be living &c.;) in such case, if at least there is no limitation over in the event of none of them surviving, the whole class will take vested interests, notwithstanding the super-added description, where they would take vested interests in the absence of such superadded description, and
 283 where they are all alive at the death of the testator. And if the survivorship refers to the death See § 97-8, of the testator, they will take absolute vested interests, the 284. superadded description being construed to be an
 284 alternative limitation of an irregular form. But if See § 128, the survivorship refers to a subsequent period, they 184-5. will take vested interests, subject only to be divested in favour of the survivors, in case of the death of some one or more of them, before the period to which the survivorship refers, the superadded description being then construed to be an irregularly formed conditional limitation. So that, in See § 148-9. the last case, if all of them survive that period, the interests of all of them will be changed from defeasible into absolute vested interests; and if all of them die before that period, their interests will also become vested absolutely, and be transmitted to their representatives. (b)

SECTION THE SECOND. [142]

Cases where the Devise or Bequest has reference to a future Age or an UNCERTAIN Event which does NOT form part of the Description of the Devisee or Legatee, and there is NO Indication of Vesting.

285 I. WHERE real or personal estate is devised or I. Where the bequeathed to a person, when or as soon as he shall conditional attain a given age, or when an event shall happen which words are,

(b) See *Browne v. Lord Kenyon*, 3 Mad. 410; and *Sturges v. Pearson*, 4 Mad. 413; stated *infra*; and *Belk v. Slack*, 1 Keen, 288. But see *Billingsley v. Wills*, 3 Atk. 219; and *Smith v. Vaughan*, 1 Vin. Ab. tit. "Devise," 381, pl. 32; as stated, 1 Rep. Leg. 507, 511. As to the time to which survivorship refers, Sir John Leach, V.C., in *Cripps v. Wolcott*, 4 Mad. 15, said "that if a legacy is given to two or more equally to be divided between them, or [or, and] to the survivors or survivor of them, and there be no special intent to be found in the will; the survivorship is to be referred to the period of division." This rule is approved of by Mr. Jarman, as regards both real and personal estate, though, as he shows, it is opposed to many authorities. See his review of the cases, 2 Jarman. Powell on Dev. 780, &c. See also 2 Rep. Leg. by White, 334—355; and *Doe d. Long v. Prigg*, 8 B. & C. 231, where a testator devised to A. for life, and after her decease to the surviving children of W. J. and J. W., and their heirs, and it was held that the word "surviving" referred to the death of the testator.

when, as soon may never occur at all, or "at, (a) or "upon, (b) or from and as, at, upon, after his attaining such age, or the happening of such event; and there are no other words indicative of an intent to confer a vested interest; and nothing, in the form of the limitation itself, to indicate an intent merely to delay the vesting in possession or enjoyment, and no disposition of the intermediate income; in such case, the interest of the devisee or legatee will be contingent until he attains the age specified, or the event described has happened. 286

See § 290. For, although in this case the person is ascertained, yet the property is only given to him at a future period which may never arrive; and the gift can no more attach upon him before that period, than it could if the testator, continuing to live, were to defer making any devise or bequest till such period had actually arrived.

See § 281. We find this doctrine in the Civil Law: Si dies adposita legato non est, præsens debetur aut confestim ad eum pertinet, cui datum est; adjuncta, quamvis longa sit, si certa est, veluti *calendis Januariis centesimis*, dies quidem legati statim cedit: sed ante diem peti non potest. At si incerta, (quasi *cum pubes erit, cum in familiam nupserit, cum magistratum inierit, cum aliquid demum fecerit*) nisi tempus, conditione obligat, neque res pertinere, neque dies legati cedere potest. D. 36. 2. 21.

The doctrine of the Civil Law. adposita legato non est, præsens debetur aut confestim ad eum pertinet, cui datum est; adjuncta, quamvis longa sit, si certa est, veluti *calendis Januariis centesimis*, dies quidem legati statim cedit: sed ante diem peti non potest. At si incerta, (quasi *cum pubes erit, cum in familiam nupserit, cum magistratum inierit, cum aliquid demum fecerit*) nisi tempus, conditione obligat, neque res pertinere, neque dies legati cedere potest. D. 36. 2. 21.

[143] Dies incertus conditionem in testamento facit. 288 D. 35. 1. 75.

Dies incertus appellatur conditio. D. 30. 1. 30, § 4. 289

Nash v. Smith, 17 Ves. 29. And it is supported by various decisions. Thus, 289a where a testator, after empowering his trustees to sell part of his real estate, if they should think fit, for payment of debts, legacies, and charges, directed them to invest the proceeds in trust to pay the interest to his son T. N., until he should attain the age of 30 years; and, in case of his decease before that age, in trust for his children, and from and after his son should have attained 30, he directed his trustees to convey and assign all such parts of his estate, not applicable for other the purposes of his will, to his son T. N., his heirs, &c.; it being his intention that his son should have no power over any part of his real or personal estate, except as aforesaid, until he should attain the age of 30. Sir W. Grant, M. R. held, that as there was no mention of the beneficial interest in the real estate, previous to the disposition of it from and after T. N. should have attained the age

(a) *Onslow v. South*, 1 Eq. Ca. Ab. 295, pl. 6; and *Cruse v. Barley*, 3 P. W. 20; as stated, 1 Rep. Leg. 489.

(b) *Judd v. Judd*, 3 Sim. 525; and *Hunter v. Judd*, 4 Sim. 455; as stated, § 362.

of 30 years; and as *T. N.* never attained 30; he never took the real estate under the will, but as the heir at law, notwithstanding the declaration that he should have no power over any part of the real or personal estate.

Again, a testator bequeathed a sum of stock to his trustees, upon trust to stand possessed thereof for *D. G.*, until he should attain 25. He then directed them to transfer the same to *D. G.* when and so soon as they should think proper; and in case *D. G.* should die without issue before receiving the bequest, the same was ordered to sink into the residue. Sir Thomas Plumer, M. R., observed, that there was no direct gift to *D. G.* except through the medium of a discretionary transfer, for which no time was fixed; and that if he should die without issue before such transfer, the bequest was to sink into the residue; and that therefore the vesting must in the meantime be suspended; and, consequently, that the dividends must await the final disposition of the capital. *Gordon v. Rutherford*, 378. *Turn. & R.*

So where a testator bequeathed to his wife the use of his furniture, &c., which he desired might be distributed amongst his children on the youngest attaining 21, at her and his executor's discretion; such part being nevertheless reserved for her use as might be thought convenient, and, at her death, to be distributed as above directed, Sir John Leach, V. C., held, that three children who died under 21, did not take, inasmuch as there was only a power to the widow and executors to distribute at their discretion certain specific articles when the youngest attained 21. *Ford v. Rawlins*, 1 Sim. & Stu. 328. [144]

And where a testator gave to *A.*, as soon as he attained 21, the sum of 3000*l.* with interest; Sir John Leach, V. C., held, that the expressed intention must prevail; and that there was no gift either of principal or interest until *A.* attained 21. *Knight v. Knight*, 2 Sim. & Stu. 490.

290 II. But a distinction would seem to exist, between II. Where devices of real estate and legacies, where, instead of the words "when," "at," "upon," "from and after," the words "if," "in case," "provided," are used. For, 291 1. Where a legacy is bequeathed to a person, if, or in case, or provided he shall attain a given age, &c.; the vesting of the legacy is suspended, just in the same way as if it had been bequeathed to him, when he should attain a given age, &c., or at, or upon, or 292 from and after his attaining such age &c. (c). (1) As regards legacies payable out of real estate, it is out of real estate, it is conceived that they would be equally contingent, whether the words "if," "in case," "provided," are used, or the words "when," &c., for the reasons given in a subsequent

(c) See 1 *Rop. Leg.* 490; and *Elton v. Elton*, 3 *Atk.* 504, as there stated.

See § 324-6. page, in relation to other cases where they are held
 (2) Payable contingent. (2) And, as regards legacies payable 293
 out of per- out of personal estate, the subtle distinctions be-
 sonal estate. tween conditions, and those clauses which are termed in a
 preceding page indirect limitations, in the original sense, and
 the technical distinctions between the words "if," and "in
 case," and "provided," were unknown to the Civil Law, by
 which legacies payable out of personal estate are governed;
 and that Law therefore treats the words in question as tan-
 tamount to each other, if not as entirely synonymous ex-
 pressions.

The doctrine
 [145]
 of the Civil
 Law.

Si Titio, *cum is annorum quatuordecim esset* 294
factus legatum fuerit, et is ante quantum decimum
 annum decesserit verum est ad hæredem ejus non transire:
 quoniam non solum diem sed et conditionem hoc legatum in
 se continet, si effectus esset annorum quatuordecim. . . . Nec
 interest utrum scribatur, *Si annorum quatuordecim factus*
erit: an ita. cum priore scriptura per conditionem tempus
 demonstratur, sequenti per tempus conditio: utrobique tamen
 eadem conditio est. D. 36. 2. 22.

Non solum ita stipulari possumus, *Cum mori-* 295
eris: sed etiam, *Si morieris*. Nam sicuti inter
 hæc nihil interest, *Cum veneris*, aut *Si veneris*: ita nec ibi
 interest, *Si morieris*, et, *Cum morieris*. D. 45. 1. 43. § 3.

2. In the
 case of real
 estate.

(1) Where
 the word
 "provided"
 follows the
 devise, and
 there is no
 limitation
 over.

See § 12, 13,
 15 19.

(2) Where
 the word
 "provided"
 follows the
 devise, and
 there is a li-
 mitation
 over.

See § 7, 13,
 24-43.

(3) Where
 the word "if"
 or the words
 "in case,"

2. As regards real estate,
 (1) Where a devise is made to a person, pro- 296
 vided he lives to attain a given age, &c., so that
 the conditional expressions do not precede, but follow the
 devise; and there is no limitation over in the event of his
 not attaining such age, this is a condition subsequent, giving
 the heir of the testator a right of entry in case of the event
 of his not attaining the age specified, instead of being a
 condition precedent, suspending the vesting of the estate:
 for the word "provided" is one of the three technical
 words which *proprio vigore* import a condition subse-
 quent.

(2) But if there is a limitation over in the event 297
 of the devisee not attaining the age specified, the
 words "provided" &c. are a condition, in the widest sense
 of the term, of that kind which is termed, in a preceding
 page, an irregular special or collateral limitation, the effect
 of which is to put a termination to the estate, in the event
 of the devisee not attaining the age specified, instead of
 being a condition precedent, suspending the vesting of the
 estate.

(3) And where real estate is devised to a person 298
 "if," or "in case" he shall attain a given age, &c.,
 so that the conditional expressions follow the devise, and
 there is no limitation over in the opposite event; it is con-

ceived that this would be a condition, in the widest sense of follow the the term, of that sort which is termed in a preceding page devise, a regular special or collateral limitation of the indirect kind, See § 7, 34, causing the cesser of the estate, in the event of the devisee 38, 42. not attaining the age specified, instead of a condition prece- See § 13.

dent suspending the vesting of the estate.

299 It is certain from *Spring v. Cæsar, Edwards v.* [146]
Hammond, and Bromfield v. Crowder, that this See § 351.

is the case where there is a devise over in the opposite event. And, even where there is no such devise over, it is conceived that the same construction would prevail. For, if these words are capable of that construction where there is a devise over, it would seem equally clear that they are capable of the same construction where there is no such devise over. And if they are capable of that construction, it would seem that it ought to be adopted; because an interest, shall, if possible, be considered as vested, rather than contingent. See § 200-9.

300 True it is, that the word "if," and the words "in case," are directly conditional, and consequently might at first sight appear even more directly and necessarily to import a condition precedent, than the words "when," "at," "as soon as," "upon," "from and after," which only imply a condition, and yet often denote a condition precedent. (See § 285.) But, conditions, we must remember, may be either precedent or subsequent, either suspensive or destructive. (See § 12, 13.) And although the words "if" and "in case" are indeed more directly and necessarily conditional; because they properly import contingency, whereas the words "when," "at," "upon," "as soon as," "from and after," abstractedly regarded, do not import contingency to any greater degree than they import certainty; yet, the words "if" and "in case" are not so directly and necessarily suspensive, in their import and operation, as the words "when," "at," "upon," "as soon as," "from and after," which are necessarily suspensive, either of the ownership, or of the possession or enjoyment. See § 46, 50,

Distinction between the import of the words "if" and "in case," and the import of the words "when," "as soon as," "at," "upon," "from and after."

It may be shown, independently of the leaning towards vesting, and of any such decisions as those to which allusion has just been made, that the word "if," and the words "in case," are, in their own nature, capable of a non-suspensive, and yet a conditional operation. For, a devise to a person if or in case he shall live to attain a given age, is capable of being interpreted, (as it was in fact in *Edwards v. Hammond, and Bromfield v. Crowder,*) without doing any violence to language, to mean an immediate devise to him, provided, or upon the supposition or condition, that he shall thereafter live to attain the required age. And the same construction may be fairly adopted, where the sub- See § 299. [147]

ject matter of the condition is the sustaining a certain character, or the performance of a particular act; though, in these cases, such a construction is not quite so easy of application, as in the former case. The words in the former case amount to the same thing, as if the words had been, if he shall continue to live till he shall attain such an age; and these words are as obviously non-suspensive as the words to *A.*, and the heirs of his body, Lords of the Manor of Dale, which (*A.* being Lord of the Manor at the time) of course are not a condition precedent, but words constituting a limitation, amounting, in effect, as they do, to the same as a devise to *A.* and the heirs of his body, so long as they shall continue to be Lords of the Manor of Dale.

See § 13, 24,
26, 34, 42.

See § 41.

On the other hand, the words "when," "at," "upon," "as soon as," "from and after," are not capable of this non-suspensive, and yet, at the same time, conditional operation. For there is no condition except that denoted by the period to which they refer; and that period is a future period; and there is no gift except at that future period. Of course these words may be construed to mean the same as the word "if," or the words "in case." But such a construction would not be a fair interpretation. It would not be a construction of words according to one sense which they will naturally bear, in preference to another sense which is merely their *prima facie* import, as in the case of the above-mentioned construction of the words "if," "in case;" but it would amount to a conjectural translation of the words "when," "at," "upon," "as soon as," "from and after," into others of a different meaning; unless there were some expressions, independent of these words, indicating an intention to confer a vested interest on the devisee, and depriving such words of their proper suspensive sense.

SECTION THE THIRD.

Cases where a Devise has reference to a Time or Event CERTAIN, and there are no Indications of, or Grounds for supposing, an Immediate Vesting.

WHERE real estate is devised to a person at a future period, and yet not by way of remainder, it matters not, as regards the vesting, whether that period is sure to arrive or not. If the vesting would be suspended, according to the rule in the preceding section, in case the event were contingent, the vesting will be equally suspended, though the event may be one that is sure to arrive. The only difference is, that, in the former case, the interest

See § 75, 75a, is a certain executory interest, whereas, in the latter it is a 301-8
§4-6, 90-1. contingent executory interest.

SECTION THE FOURTH.

Cases where a Devise or Bequest has reference to a future Age, Time, or Event, NOT forming part of the Original Description of the Devisee or Legatee; and there ARE Indications of, or Grounds for supposing, an Immediate Vesting.

GENERAL PROPOSITION.

309 WHERE real or personal estate is devised or be- See § 79-81.
queathed to a person, and though the vesting in
right or interest at first sight appears to depend upon the
attainment of a given age or upon the arrival or occurrence
of an event or time which is sure to happen or arrive, or, in See § 341-2.
the case of residuary bequest without any limitation over,
upon marriage; yet, if the attainment of such age, or the
arrival or occurrence of such event or time does not form
part of the original description of the devisee or legatee, and See § 281,
the suspensive expressions are of such a nature, that they 366.
may be construed to refer, not to the vesting in right or See § 344.
interest, but to the vesting in possession or enjoyment; and
it appears, from the form of the limitation, when more close- See § 310.
ly considered, or from the intermediate disposition of the
property, or from other passages, to be probable, that it was [149]
only intended to delay the vesting in possession or enjoy- See § 328-9,
ment; in such case, the suspensive expressions will be refer- 340, 340a,
red to the vesting in possession or enjoyment, and the inte- 345.
rest of the devisee or legatee will be actually vested in right
before the age or period specified.

SPECIFIC RULES.

RULE I.

Where the Time is not annexed to the Gift itself.

310 If the testator does not annex the time to the
devise or bequest itself, but merely to the payment,
possession, or enjoyment; or, in other words, if he first makes
a devise or bequest unconnected with the attainment of any
particular age, or the arrival of a future period, and then,
by a distinct sentence or member of a sentence, directs, that
the devisee or legatee be let into possession or enjoyment, or
be paid, as soon as, or when he shall attain, or at, a given
age, or when some future period shall arrive, which must See § 342-3.
arrive, (b) or on his attaining or from and after such age, or
the arrival of such period; the devise or bequest confers an

(b) 1 *Rop. Leg.* 485, 486, ed. by White; and *Atkins v. Hiccocks*, 1 *Atk.* 500,
as there stated.

interest immediately vested in right, but not to take effect in possession till the age or period specified : or, as the phrase is, with respect to a pecuniary legacy, it is, in such case, *debitum in presenti, solvendum in futuro*. And this is the case even where there is a limitation over in case of the death of the devisee or legatee before the given age or period.

1. The application of the distinction to legacies payable out of personal estate, which are governed by [150] the Civil Law. Doctrine of the Civil Law. 1. This distinction, as to the effect of disannexing the future period from the gift itself, is firmly established as regards legacies payable out of personal estate. 311

“ Antiently legatory matters arising on personal estate, were solely under the jurisdiction of the Ecclesiastical Courts; and the decisions of those Courts were regulated by the Civil Law :” and when by degrees Courts of Equity took cognizance of them they adopted the same rule.(c) 311a

The distinction in question appears in the following passage of the Civil Law :— 312

Ex his verbis, Do, lego Æliæ Severinæ filiæ, meæ, et Secundæ decem : quæ legata accipere debebit, cum ad legitimum statum pervenerit : non conditio fideicommisso, vel legato inserta, sed petitio in tempus legitimæ ætatis dilata videtur. Et ideo, si Ælia Severina filia testatoris, cui legatum relictum est, die legati cedente, vita functa est, ad hæredem suum actionem transmisit ; scilicet ut eo tempore soluto fiat, quo Severina, si rebus humanis subtracta non fuisset, vigesimum quintum annum ætatis impleisset. C. 6. 53. 5.

“ This distinction has also been supported by numerous decisions : (d) 313

Grant v. Grant, 3 Y. & C. 171. Thus where a testatrix bequeathed her residuary estate to her adopted daughter, and, in a subsequent passage, she directed the daughter’s property to be paid on the day she should attain 25, and not till then ; unless she should marry, her whole property then to be settled upon her and her children. It was held that the daughter, having attained 21, was entitled to the income of the property.

Blease v. Burgh, 2 Beav. 221. And so where a testatrix gave her residuary estate to trustees, to accumulate, and to stand possessed thereof and of the accumulations, in trust for all the children of J. B.,

(c) Butler’s Note, Fearn, 552 (g), II.

(d) See Cases stated, 1 Rop. Leg. 479—480 ; namely, *Bolger v. Mackell*, 5 Ves. 509, where the period was the attainment of 21 ; *Jackson v. Jackson*, 1 Ves. Sen. 217, where it was at another’s death ; *Sidney v. Vaughan*, 2 Bro. Parl. Ca. 254, where it was at the end of an apprenticeship ; *Gaskell v. Harman*, 6 Ves. 159 ; 11 Ves. 489, where it was after the realization of the assets ; *Stuart v. Bruere*, 6 Ves. 558, in note ; and *Faulkner v. Hollingsworth*, 8 Ves. 558, where it was after a sale of lands ; *Entwistle v. Markland*, 6 Ves. 558, in note ; and *Sitwell v. Barnard*, *ib.* 522, where it was after a purchase of lands.

other than *T. S. B.*, and to be paid on attaining 23; with a gift over, in the event of the death of all the said children under 23. *J. B.* had three children; two born in the lifetime of the testatrix, and a third *A. W. B.*, who was born afterwards, and attained 23. Lord Langdale, M. R., after remarking that there was indeed a gift over in the event of the children dying under 23, said that a gift in terms which import a present vested interest, with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives; and that there being a general description of a class, and vested interests given, and another child born before the period of distribution, such other child must be let in to claim a share in the property.

[151]

Three observations must here be made:

314 (1) It must be carefully noticed, that where there is no gift but in a direction to pay or transfer(e) or 'divide among several persons,(f) at a future period; though the future period is annexed to the payment, possession, or enjoyment, yet it is also annexed to the devise or bequest itself. For, in this case, the direction to pay or transfer or divide, constitutes the devise or bequest itself; and, therefore, the vesting in interest is postponed, and not merely the vesting in possession or enjoyment.

Observations on the foregoing rule. (1) With reference to cases where there is no gift, but in a direction to pay, &c.

315 (2) From cases where the future period is annexed simply to the payment, possession, or enjoyment, we must be careful to distinguish those in which there is both a gift, and also a distinct direction as to the payment, possession, or enjoyment, and the future period is really, though perhaps not apparently, annexed not only to the direction as to the payment or possession, but also to the gift itself, and consequently the vesting in interest is postponed.

(2) With reference to cases where the future period is annexed, both to the payment, possession, or enjoyment, and to the gift itself.

In the case of *Kevern v. Williams*, the future period was annexed simply to the payment or possession. In that case, a testator bequeathed his residuary estate to trustees, in trust for his wife, for life, with power to sell; and, after her decease, to preserve the then remaining part of his estate, or the produce thereof, to and for the use and benefit of the grandchildren of his brother, to be by them and each of them received, in equal proportion to the effects in hand and remaining, when they and each of them should severally attain 25, and not before. Sir L. Shadwell, V. C., held, that the payment alone was postponed till they should attain 25.

[152]

(e) *Leake v. Robinson*, § 722; *Murray v. Tancred*, 10 Sim. 465.

(f) *Sansbury v. Read*, 11 Ves. 75.

Porter v.
Fox, 6 Sim.
485.

But, where a testator gave annuities to his widow and son, and directed that the surplus income of his real and personal estate should be invested in stock, and the dividends accumulated, and to be and remain assets for improvement, for the benefit of such surviving child or children as after-mentioned. And he directed his trustees, after the death of his widow and son, to sell his real estate, and invest the produce in stock as aforesaid, to be and remain assets for improvement, for the benefit of his grandchildren and his nephew *T. O.*, and to be distributed in manner and form following, that is to say, as they should become of the age of 25 respectively. It was argued, that there was first a gift of the property, for the benefit of the grandchildren and *T. O.*; and then the time for distribution followed, in a separate sentence. But Sir L. Shadwell, V. C., said that the distribution was part of the gift.

Distinction
between
Porter v.
Fox, and
Kevern v.
Williams.

At first sight, it may appear impossible to distinguish this case satisfactorily from the preceding; but on a more attentive consideration, it will be observed, that the words "in manner and form" &c., are capable of being connected, not only with the words immediately preceding them, *i. e.* the words "and to be distributed," but also with the other antecedent words, "to be and remain assets for improvement for the benefit of my grandchildren and my nephew *T. O.*" If the words of distribution had not been connected with the previous words, by the word "and," the subsequent words, "in manner and form" &c., would have belonged exclusively to the next preceding words "to be distributed;" just as the subsequent words in *Kevern v. Williams*, denoting the time of payment, belonged exclusively to the next preceding words "to be by them and each of them received." Again; the surplus income, during the lives of the widow and son, was to be "for the benefit of such surviving child or children as after-mentioned." The surviving children after-mentioned were, in a subsequent passage to those above recited, explained to be, those who should live to attain 25. Now, as the surplus income, during the lives of the widow and son, was not given till the class, or one of the class at least, should attain 25; so, it was to be supposed that the produce arising from the sale was intended to be disposed of in the same manner. And accordingly, we find, not only that the words denoting the time of distribution are connected with and form part of the antecedent gift, as already shown, but that the testator so disposed of such produce, in subsequent clauses, as to exclude, from a participation in the property, every member of the class who died under 25, except the last survivor.—It has been thought the more requisite to endeavour to distinguish this case from that of *Kevern v. Williams*, as the

[153]

learned Reporter states that it was carried by appeal before Lord Lyndhurst, C., and His Lordship directed a case to be made for the opinion of the Court of Common Pleas, though, before the case was argued, the suit was compromised.

316 (3) The distinction above-mentioned as to the (3) With reference to the disannexing the time from the gift, * has been held by some equity Judges, altogether without foundation, and by others it has been treated as too refined.^(g) And it is expressly stated by, or may be collected from, all, or almost all the authorities, that it is a rule exclusively applicable to legacies payable out of personal estate. of; but is in reality founded on one among many indications of the testator's intention. Quotation from Voet.

317 But, when carefully considered, it is conceived, that the rule will be seen to be not "a mere positive rule" of the Civil Law, or a subtle "refinement," but a distinction founded in the intention of the testator—in one among several kinds of indications of an intent merely to postpone the actual possession.

318 This is well put by the learned Voet:—Dies incertus conditionis loco habetur, et ad hunc diem incertum plane reduci debet ætas certa, quæ testator legatario legatum præstari voluerit, nisi dies incertus morandæ tantum solutionis gratiâ adjectus sit: quippe quo casu statim a morte testatoris legati dies cedit, ac legatario ante diem moriente, legati expectatio ad hæredes transit.

Quando autem dies talis incertus conditionem faciat, aut e contrario tantum morandæ solutionis gratiâ adjectus intelligatur, voluntatis quæstio est; et si quidem ab initio dies incertus pubertatis majorennitatis &c. adjiciatur legato uno verborum complexu, veluti Titio, cum ad legitimam ætatem pervenerit, centum do lego, credendum in dubio magis est, diem incertum conditionis vice a testatore appositum esse, ac ob id impedire legati transmissionem; sin diversis orationibus, veluti Titio centum lego, quæ ei præstari volo, cum ad puberem ætatem pervenerit, diem pubertatis potius morandæ solutionis gratiâ addidisse testatorem, quam legato, quod ab initio pure datum erat, conditionem inseruisse, præsumendum est.—Voet. Com. ad Pand. lib. 36, tit. 2, sec. 2. [154]

319 2. Regarding, then, the distinction as founded in 2. Application of the intention of the testator, it is conceived that a similar distinction is equally applicable to real estate. distinction to

320 It would seem that there can be no doubt whatever, that if real estate were devised to a person, with a direction that he should be let into possession of it at 21 or some period that is sure to arrive, which would be an analogous case, that he would take a vested interest. Indeed, so great is the leaning in favour of vesting, that it See § 200-9.

(g) Sir W. Grant, M. R. in *Hansom v. Graham*, 6 Ves. 245.

would appear that words far less strong, would have the effect of vesting the interest.

Snow v. Poulden, 1 Keen, 186., In a case where a testator directed the residue of his property to be invested in land, and given to his grandson, who, by a subsequent clause, was "not to be of age to receive this" until he attained 25, and to be entitled to him and his male heirs; Lord Langdale, M. R., held, that the devise took an immediate vested interest, subject to be divested, if he should not attain 25; and that the rents and profits were consequently applicable to his benefit during his minority.

3. Non-application of [155] the distinction to charges on real estate. 3. But ^hthe distinction in question does not exist in regard to charges on real estate. (h) 321

Mr. Cox, in his note to *The Duke of Chandos v. Talbot*, 2 P. Wms. 612, says, that "with respect to all interests arising out of land, whether the land be the primary or auxiliary fund, whether the charge be made by deed or will, as a portion or general legacy, for a child or a stranger, with or without interest, the general rule is, that charges upon land, payable at a future day, shall not be raised where the party dies before the time of payment." And in support of this proposition, he refers to a multitude of cases. 322

The non-application of the distinction to charges on real estate, is no reflection against its soundness. Reasons for the non-application thereof; namely, (1) Non-existence of the money before the future period. The refusal to apply the distinction of the Civil Law to cases not directly governed by it, as to charges on real estate, would seem, at first sight, to be a reflection against its soundness, when applied to real estate itself, or to legacies payable out of personal estate. But in reality this is not the case. Several reasons may be assigned for refusing to adopt the rule of the Civil Law, in regard to charges, by deed or will, on real estate. 323

(1) Where a legacy or portion charged on real estate, is to be paid at a certain age, the money given is not in existence at any time prior to the period appointed for its payment: the arrival of such period is; as it were, that which is to call it into being: and therefore, there can be no gift except at the time for payment; for, that which is not in *esse*, cannot be given as an immediate gift. And hence, although there may seem to be, and there is, in terms, a prior immediate gift distinct from the time of payment, yet, in reality, in this case, there is no gift but at a future time. And consequently, the principle of the Civil 324

(h) *Pawlett v. Pawlett*, 1 Vern. 321, affirmed by the House of Lords; *Smith v. Smith*, 2 Vern. 92; *Yeates v. Phettiplace*, 2 Vern. 416; *Proc. Ch.* 140; *Jennings v. Looks*, 2 P. W. 276; *Duke of Chandos v. Talbot*, 2 P. W. 602, 612; *Prowse v. Abingdon*, *Gawler v. Standerwicke*, 1 B. C. C. 106, in note; *Harrison v. Naylor*, 3 B. C. C. 108; 2 Cox, 247; as stated, 1 Rep. Leg. 553—559.

Law rule has no application whatever to legacies or portions payable out of real estate. This, it is submitted, constitutes at once a sufficient reason for the non-adoption of that rule as to charges of this kind. But;

325 (2) The charging real estate with legacies, may (2) Favour amount to a partial disinherison of the heir at law; shown to the and he is never to be disinherited, except by express words heir. or necessary implication. And hence, as between the heir and the representative of a deceased legatee, the mere annexing of the future period to the time of payment may not be regarded as a sufficiently clear indication of intention, that the legacy itself should not be contingent, and that the heir should be under the obligation of paying it, though the legatee should not attain the given age. [156]

In *Tournay v. Tournay*, 2 Ves. Sen. 264, the Lord Chancellor expressly says, that, in such cases, the portion sinks "in favour of the heir, and for the benefit of his inheritance." And "the same reason is assigned by Butler.(i)

It is right, however, to add, that,

326 (3) Lord Hardwicke, after observing that the (3) The com- Court had never gone upon the ground that the mon law is heir was a favourite with a Court of Equity, or that the adhered to in Court would go as far as it can in keeping an estate free from incumbrances, said, that the true reason was this—"in the case of lands, the rule of the common law has always been adhered to: as suppose a person should covenant to pay money to another at a future day; if the covenantee die before the day of payment, the money is not due to his representative."(k)

327 4. "It sometimes happens that legacies are 4. The ap- charged on a mixed fund, that is, both on real and lication of personal estate; in that case, the personal estate is considered to be the primary fund, and the real estate to be the auxiliary fund, for the payment of the legacies. So far as the personal estate will extend to pay them, the case is governed by the same rules as if the legacies were payable out of fund. personal estate only; and so far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on real estate only. *Duke of Chandos v. Talbot*, 2 P. W. 601; *Prowse v. Abington*, 1 Atk. 482."(l)

RULE II.

[157]

Where there is a Gift of the Whole Intermediate Income.

328 "Where the testator gives the whole of the in- See § 367-9. termediate income of real estate, or of personal

(i) Butler's Notes, Co. Litt. 237 a, (1); and Fearn, 552, (g), II.

(k) 1 Atk. 486, as quoted, 1 Rep. Leg. 556.

(l) Butler's note, Fearn, 552, (g), III.

estate not arising from a charge on real estate, to the person to whom he devises or bequeaths such estate, on the attainment of a certain age, but the attainment of that age
 See § 281. does not form part of the original description of the devisee or legatee; the interest of the devisee or legatee is vested in
 See § 79-81. right before that age, even though there is no prior distinct gift—no express gift except at that age;(m) it being considered that the testator merely intended to keep the devisee or legatee out of the possession or enjoyment until he should have become better qualified to manage, and more likely to take due care of the property. But, as we 329 have already seen, the gift of interim interest will not be sufficient to vest charges on real estate.(n)

Doctrine of the Civil Law. This gift of the intermediate income would seem 330 to have been considered as an indication of vesting by the Civil Law:

Cum ab hæredibus alumno centum dari voluisset testator, eamque pecuniam ad alium transferri, ut in annum vicesimum quintum trientes usuras ejus summæ perciperet alumnus, ac post eam ætatem sortem ipsam: intra vicesimum-quintum annum eo defuncto, transmissum ad hæredem pueri fideicommissum respondi: nam certam ætatem sorti solvendæ præstitutam videri, non pure fideicommisso relicto conditionem insertam. D. 36. 2. 26. § 1.

That the gift of the interim income is an indication of immediate vesting, is also established by numerous decisions. 331

[158] In one case, indeed, where a testator gave *R. E.* the dividends on 500*l.* stock, until he should arrive at 32, at which time she directed her executors to transfer the principal to him; Lord Loughborough, C., held, that the legacy did not vest till 32, His Lordship observing that dividends are always a distinct subject of legacy, and capital stock another subject of legacy; and that there was no gift but in the direction for payment, which only attached upon a person of the age of 32.

Batford v. Kebbell, 3 Ves. Jun. 363.
 See also *Taylor v. Bacon*, 8 Sim. 100.

But this has been overruled by many subsequent decisions.

Edwards v. Symons, 6 Taunt. 213. A testator devised an estate expectant on the decease of his mother, to trustees, to receive and apply the rents for the maintenance, education, and advancement of six of his chil-

(m) *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228; as stated, *Fearne*, 245. See also *Fonereau v. Fonereau*, 3 Atk. 645; *Hoath v. Hoath*, 2 B. C. C. 4; *Walcott v. Hall*, 2 B. C. C. 305; and 2 Meriv. 386; and *Dodson v. Hay*, 3 B. C. C. 404, 409; as stated in *Roper on Legacies*. See also *Murray v. Adenbrook*, 4 Russ. 407; stated § 654.

(n) *Gawler v. Standerwicke*, 1 B. C. C. 106, in note; as stated, 1 *Rop. Leg.* 558.

dren, whom he named; and immediately on *E.* (the youngest) attaining 21, then, he devised the same to his said six children, and to the survivors and survivor of them, their heirs and assigns, as tenants in common. One of the six children died in the testator's lifetime, and *T.*, another of them, died before *E.* attained 21. It was held that *T.* had, at the time of his death, a fee simple estate in one undivided fifth, which descended to his heir at law.

Again, a testator gave his three grandchildren 500*l.* stock *Hanson v. Graham*, 6 Ves. 269. apiece, when they should respectively attain their ages of 21, or days of marriage, provided it was with consent of his executors; and he directed that the interest should be laid out for the benefit of his grandchildren until 21 or marriage. One of them died at the age of nine. Sir W. Grant, M. R., held, that she took a vested legacy. His Honour observed, that the word "when," as referred to a period of life, standing by itself and unqualified by any words or circumstances, is a word of condition; for, it is just the same, in speaking of an uncertain event, whether we say "when" or "if" it shall happen, [that is, the word "when" is certainly no less suspensive than the word "if"]; and that such is the doctrine of the Civil Law, from which our rules as to pecuniary legacies were borrowed. (6 Ves. 249.) That the judgment in *May v. Wood*, which implies the reverse, as reported, must be regarded as inaccurate. That the only cases alluded to in that case, are cases of real estate, where it was evident that only the payment was postponed for a particular purpose, namely, in order that the devisee might not have the possession and management until 21, as in *Goodtitle v. Whitby*, and *Dee v. Lea*; or for the payment of debts, as in *Boraston's Case*; or for the benefit of a third person, as in *Manfield v. Dugard*. That if those cases therefore had occurred as to pecuniary legacies, there was no ground to say that the decision ought to have been different; for, from the very same circumstances and expressions it might be collected that the word "when" was used, not as a condition, but merely to postpone the enjoyment, the possession in the meantime being disposed of another way. (*Ib.* 246, 247.) That, in the present cause, he should have determined against the plaintiffs, if it stood merely upon the first words. (*Ib.* 249.) But the legacy was accompanied with an absolute gift of the interest, which, according to the established rule, had the effect of vesting it. (*Ib.* 250.)

So where a testator gave the interest of money in the funds to *J. H. L.*, for his second daughter that should be born, for her education, till she should attain 21; and after she should attain 21, he gave the interest to her and to her heirs for ever, she being christened *Z*; and, in default of such issue, he gave the same to the second son of *J. H. L.* *Lane v. Goudge*, 9 Ves. 225.

And he gave 30*l.* a year to *J. H. L.* till the said second daughter should attain 21; and, after she should attain 21, then, he gave the same to her and her heirs for ever. Sir W. Grant, M. R., held, that both bequests were vested: for, as to the first bequest, *Z.* was to have the whole benefit during her minority; and, as to the second bequest, supposing that the Court could not supply the words expressing the purpose of education, and that the father himself was entitled, still, it was an interest in remainder, to take effect in the child at the age of 21.

Doe d. Doley v. Ward, 9 Ad. & El. 562.

So where a testator, after giving a life interest to his daughter *S.*, in freehold and leasehold estates, devised the same to such of her children as she then had, or might have, if a son or sons, at 23, and if a daughter or daughters, at 21, their heirs, executors, administrators, and assigns, as tenants in common; with survivorship, in case of the death of any child or children of *S.* under the above age; and a devise over, in case of the death of all of them under that age.

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And he directed that the rents should (after all necessary outgoings for repairs, ground-rent, and insurance) be applied for and towards the maintenance of the children of *S.* until they should become respectively interested as before mentioned. It was held, on the authority of *Doe d. Roake v. Nowell*, and *Randoll v. Doe d. Roake*, that the children took vested interests in remainder, immediately on the death of the testator.

Rolfe v. Sowerby, 1 Tam. 376.

And where a testator directed his personalty to be invested in the hands of his executors, for the sole use and maintenance of his daughter, until she arrived at 21; and when she attained 21, to receive the overplus, if any; Sir John Leach, M. R., held that the daughter took a vested interest, though she died under 21.

Breedon v. Tugman, 3 M. & K. 289.

So where a testator gave one third of his personal estate to his daughter, and, in case of his decease, to have the interest therein, and principal when she attained 25. Sir John Leach, M. R., held that it was an absolute gift to the daughter, and that the payment only was postponed; that the testator meant not to qualify or restrict the previous gift, but to distinguish between the time when she was to receive the interest, and the time when she was to receive the principal; that upon both grounds therefore the daughter must be held to have taken an immediate vested interest.

Watson v. Hayes, 9 Sim. 500.

Again, where a testator desired his executors to pay 25*l.* yearly, by quarterly payments, for the maintenance and education of *S.*, until she should attain 21, or be married; when he required his executors to pay her 500*l.* *S.* died under age, and unmarried. Sir L. Shadwell, V. C., held, that she took a vested interest; because 25*l.*, being the in-

terest on 500*l.* at 5*l.* per cent., might fairly be regarded as intended to be the interest of the legacy.

And in another case, Sir James Wigram, V. C., held, that the legacy was vested, observing that the testator had given the whole interim interest for the benefit of the legatees, which would vest the legacy, even if the gift and the direction to pay were not separate from each other. *Lester v. Bradley*, 1 Hare, 10.

With regard to the reasons for the foregoing rule. The reasons
 332 I. It has been argued, that "a legacy given at a certain age, with interest in the meantime, is vested, because, when a testator directs interest to be paid out of that legacy in the meantime, he means to separate that legacy from the bulk of his estate immediately." (o) This may perhaps be true with respect to a pecuniary legacy: but this reason for construing a gift of the interim income as a feature of vesting is obviously inapplicable to residuary bequests, and to devises of real estate, and legacies charged thereon. The reasons for the rule; namely, 1. Giving of [161] interest shows intention to separate the legacy from the residue.

2. Another reason, however, has been assigned, for construing a gift of interest as a mark of immediate vesting, which is applicable, in its spirit, though not in terms, both to residuary bequests, and to devises of real estate, where the interim income is given to the person to whom the postponed devise or bequest is made. 2. Intermediate income is given in respect of a vested interest in the property itself.

334 Lord Hardwicke, in *Hubert v. Parsons*, 2 Ves. Sen. 264, as a reason why interest is an evidence of vesting, remarks, that "interest follows the property of the principal, as the shadow, the substance." And it has been observed, that as no interest could accrue to the legatee before the time appointed for payment of the principal, the testator's intention in giving such interest must be presumed to have been, to give the capital in all events to the legatee, and to have allowed him intermediate interest, as a recompense for the forbearance of the capital." (p)

335 The reason furnished by these observations applies, in terms, to personal estate alone; but they suggest a general reason why the gift of the whole intermediate income of real or personal estate is considered to be evidence of an interest immediately to vest the estate itself; and the reason they so suggest, is, that such income is considered to be given in respect of the actual existence of a vested interest in the property itself.

336 3. But why then is the gift of the intermediate interest insufficient to vest charges on real estate? Does not this reason equally apply to such charges, as well as to devises of real estates, and legacies payable out of per- 3. But this construction of a gift of intermediate income not

(o) Arg. of Counsel, in *Hanson v. Graham*, 6 Ves. Jun. 241.
 (p) 1 Rep. Leg. 494.

being one that arises from necessity [162] any implication, such gift is not sufficient to vest an interest, apart from the leaning in favour of vesting.

sonal estate? In answer to this, it is to be observed, that the construction or intendment, that the income is considered as given in respect of a vested interest in the property itself, is not one arising from necessary implication. True it is, that, inasmuch as a vested interest would give a right to the income, the gift of the income *may* have been given in respect of a vested interest; and that the settlor or testator may have thought it advisable expressly to give the income, with the view of preventing any one from supposing, that he meant to defer the vesting in right, as well as in possession or enjoyment; or, he may have given it in ignorance of the fact, that an interest vested in right, but not in possession, would confer a right to the intermediate income, without the necessity of any express gift of such income. But, on the other hand, not desiring to accumulate the income, but yet intending to keep the estate itself in contingency, he *may* have given the intermediate income in respect only of the probability that the party would attain the required age, and thereby acquire a vested interest, and on account of the expediency that he should receive a suitable education and support.

The gift, therefore, of the whole intermediate income, would seem insufficient, in itself, to vest real or personal estate, the possession of which is deferred till the attainment of a given age; insufficient, that is, apart from the strong leaning which exists in favour of vesting. 337

And as the leaning in favour of vesting is counterpoised by other considerations in the case of charges on real estate; the gift of the intermediate income is insufficient to vest such charges.

See § 200-9.

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Now, assuming that this is the case, we are furnished with an adequate reason why the gift of the interim income is insufficient to vest charges upon real estate, although it is sufficient, of itself, to vest devises of real estate, and interests arising out of personal estate. It would appear from the reasons already given for the sinking of charges on real estate, even where the future time is in terms annexed to the payment only, that there is no leaning in favour of the vesting of charges on real estate, or none but what is counterpoised by a leaning in favour of the heir, and by other considerations. Whereas, in the case of devises of real estate, and interests arising out of personal estate, there is a strong leaning in favour of vesting, and one which is not counterpoised by any other considerations. It is true, in regard to devises of real estate, that the heir may be disinherited by giving effect to a devise; and therefore, at first sight, the favour shown to the heir, might seem equally to counterbalance the leaning towards vesting. In the case of a devise of real estate, as in the case of a charge upon real estate created by will. But it is to be observed, that if real estate is devised at a future time, and the intermediate income is given to the devisee, the favour which is 338

in general shown to the heir at law, is counterbalanced by the manifest intention of the testator that he should take nothing. So that the leaning in favour of the heir has a See § 325. direct effect in counterbalancing the leaning in favour of vesting, in the case of charges on real estate, but has no such effect in the case of devises of real estate itself, where the intermediate rents are disposed of. And besides this, we See § 324, have seen that there are other reasons for holding such 326. charges not to be vested, which do not apply to devises of real estate itself, or interests arising out of personal estate.

339 It may be mentioned in this place, however, But if a though, indeed, it would seem sufficiently clear legacy without any judicial determination upon the point, that charged on where a legacy charged on real estate was expressly di- real estate is rected to vest immediately on the testator's death, but to be expressly di- paid to the legatee on attaining 21, and the interest in the rected to vest meantime was directed to be applied for maintenance, and before the day for pay- the legatee died before 21, the representative of the legatee ment, it will was held to be entitled, by force of the express direction so vest, that the legacy should vest on the testator's death.(q)

RULE III.

Where Executors are empowered to make advances out of Portions.

340 And where the executors are empowered to make advances out of the respective portions of children, to whom a residuary bequest is made on their attaining a certain age, without any limitation over; the children take immediate vested interests.

A testator directed his residuary personal estate to be Vivian v. equally divided amongst his children on their attaining 21; Mills, 1 and that his executors should make any moderate advances, Beav. 315. for the purpose of placing his children out in a profession, [164] from their respective portions. Lord Langdale, M. R., held that a son who died under 21 took a vested interest.

RULE IV.

Where the Postponement is apparently from Necessity, or for the Accomplishment of some Special Purpose in the meantime, unconnected with a Suspension of the Property or Ownership.

340a Where there is, in terms, no devise or bequest See § 341-3. except on the attainment of a certain age, or at a future period which is sure to arrive, but such age or See § 281. period does not form part of the original description of the

(q) *Watkins v. Cheek*, 2 Sim. and Stu. 199.

devisee or legatee; and the postponement seems merely to arise from the circumstances of the estate; or appears to be for the accomplishment of some special purpose, unconnected with a suspension of the property or ownership;—as, for the purpose of paying the debts of the testator, out of the intermediate income(r) or out of a part of the estate, or merely for the improvement of the estate, in point of value(s) or otherwise; or merely for the benefit or convenience of some other person to whom the income, or a particular interest, is given in the meantime;(t)—in such case, it is held that there is a suspension of the possession or enjoyment, only and not of the property or ownership, as in the case of a present vested interest in real estate, subject to a term for years, or as in the case of an ordinary vested remainder in real estate, even though there is no prior distinct gift, no express gift but at the future age or period.

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Bacon v. Proctor,
Turn. &
Russ. 31.
See also
Marshall v. Holloway, 2
Swanston,
451.

Sir Edmund Lacen, Bart., upon the marriage of his daughters, demised an estate to trustees, upon trust for raising certain sums to be settled upon the daughters and their children: and, by his will, (after charging the estate with other sums to be settled upon the same trusts; with portions for sons; and with a further sum in discharge of a mortgage of another estate;) devised the first mentioned estate to trustees, upon trust, from time to time to receive the rents and profits, and invest the same in the purchase of stock, so as to accumulate and form a fund for the payment

(r) *Boraston's Case*, 3 Rep. 19; as stated, *Fearne*, 242; and noticed by Sir W. Grant, in *Hanson v. Graham*, 6 Ves. 239; as stated, § 331.

(s) *Love v. L'Estrange*, Bro. Parl. Ca. 59, 8vo ed.; as stated, 1 Rep. Leg. 499. See also *Doe d. Wheeldon v. Lea*, 3 D. & E. 41; as stated, *Fearne*, 246.

(t) 1. AS REGARDS REAL ESTATE, see *Manfield v. Dugard*, 1 Eq. Ab. 195; as stated, *Fearne*, 245; and noticed by Sir W. Grant, in *Hanson v. Graham*, 6 Ves. 239; as stated, § 331.

2. AS REGARDS LEGACIES PAYABLE OUT OF PERSONAL ESTATE, see *Monkhouse v. Holme*, 1 Bro. C. C. 298; *Att. Gen. v. Crispin*, *Ib.* 386; *Benyon v. Maddison*, 2 Bro. C. C. 75, ed. by Belt; and *Scarfield v. Howes*, 3 Bro. C. C. 90; as stated, 1 Rep. Leg. 503, ed. by White. *Wadley v. North*, 3 Ves. 364.

3. AS REGARDS LEGACIES PAYABLE OUT OF REAL ESTATE, see *King v. Withers*, *Forrest*, 117; 3 Bro. Parl. Ca. 135, 8vo ed.; *Hutchins v. Foy*, *Com. Rep.* 716, 723; *Louther v. Condon*, 2 Atk. 127; *Emes v. Hancock*, 2 Atk. 507; *Sherman v. Collins*, 3 Atk. 322; *Hodgson v. Rawson*, 1 Ves. Sen. 44; *Tunstall v. Bracken*, *Ambl.* 167; 1 B. C. C. 124, in note; *Embrey v. Martin*, *Ambl.* 230; *Manning v. Herbert*, *Ambl.* 575; *Jeal v. Tichener*, 1 B. C. C. 120; in note; *Clarke v. Ross*, 2 Dick. 529; 1 Bro. C. C. 120, in note; *Kemp v. Davy*, 1 Bro. C. C. 120, in note; *Pawsey v. Edgar*, 1 Bro. C. C. 192, in note; *Thompson v. Dow*, 1 Bro. C. C. 193, in note; *Morgan v. Gardiner*, 1 Bro. C. C. 194, in note; *Dawson v. Killet*, 1 Bro. C. C. 119; *Godwin v. Munday*, 1 Bro. C. C. 191; and *Walker v. Main*, 1 Jac. & Walk. 1, 7; as stated, 1 Rep. Leg. 560—571.

of the aforesaid charges; and, after the same should have been raised and paid, upon trust for the person in whom, for the time being, the baronetcy should be vested, to the end that the estate might go along with the title, so long as the rules of law and equity would permit. It was held, that the trust for accumulation was good; and that an estate for life vested at once in the succeeding Baronet, subject to the charges, instead of being postponed till after the accumulation should be determined. Graham; Baron, sitting for the Master of the Rolls, observed, that there was no accumulation for the purpose of suspension; that the Act of the 39th and 40th of Geo. III. did not apply; and if it did, there was an exception, in the case of debts and portions; and that it was quite clear that the enjoyment, and not the property, was tied up.

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In another case, a testator devised leasehold houses, held for a term renewable, to *J. T. S.* for his own use and benefit on his attaining 21; upon trust that his (testator's) trustees should renew; and for that purpose make such surrender as should be requisite; and, out of the rents, to raise money for the fines; and also to permit the trustees to receive the rents during the minority of *J. T. S.*; and the maintenance of *J. T. S.* during his minority to be paid out of the rents. *J. T. S.* died under 21. It was held, that this was in effect a devise to the trustees till *J. T. S.* attained 21, with a vested remainder to *J. T. S.*

Again; a testator devised land to his wife, for life; and, after her decease, to trustees, upon trust to sell, and, out of the proceeds, to lay out 500*l.*, part thereof, in the purchase of an annuity for the life of his son. The son died in the lifetime of the widow. It was argued that he took nothing; because, a legacy charged upon land does not vest till the time of payment. But Sir W. Grant, M. R., though he said it was impossible to reconcile all the cases of legacies payable out of land, held that on the authority of *Dawson v. Killet*, 1 Bro. C. C. 119, the son took a vested interest on the testator's death. He previously expressed his opinion, that it was clear that the testator meant an annuity, in the proper sense, to be purchased; which was the same, in effect, as giving a legacy of 500*l.* to his son: for, on a bill filed, he might have received the money; and the Court would not have compelled the trustees to lay it out in an annuity.

So where a testator gave to *G. P.* a sum of stock at the testator's wife's death, and all the residue of his estate he gave to his wife. Sir W. Grant, M. R., held that, in effect, he took a vested remainder; the order in which the clauses are arranged in a will, not being material.

And where a testator devised in trust for his wife for life, if she should so long continue his widow; and, after her

You. & Coll. death or marriage, for the maintenance of his son *T. B.*; and 539. his daughter *E. B.*, until 21; and then, at the death or marriage of his wife, he devised to his son, *T. B.*, and the heirs of his body, only yielding and paying to his daughters, *M.* and *E.*, 100*l.* each. *M.* attained 21, and died after the marriage of the widow, but before *T.* and *E.* attained 21. Alderson, B., held that the legacy did not lapse, the payment being postponed for the convenience of the estate, and not as a condition annexed to the person of the legatee.

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Cousins v. Schroder, 4 Sim. 22.

Again; where a testator gave all his real and personal estate, after payment of debts and legacies, to his wife, for life; and directed that, at the end of 12 months after his death, 1000*l.* should be laid out in trust for his daughter, for life; and, after her decease, to divide the capital amongst her children, when and as they should attain 21. Two of the children attained 21, but died in the lifetime of the widow; one of them within 12 months after the death of the testator. It was argued, that in order to acquire vested interests, the legatees must be living at the time when the legacies were to be paid; and *Cruse v. Barley*, 3 P. W. 20, and 3 Atk. 219, were cited in support of this view. But Sir L. Shadwell, V. C., held, that the children having attained 21, took vested interests.

Pool v. Terry, 4 Sim. 294.

And so where a testator devised real estates to *A.*, for life; remainder to *B.*, in fee; and he gave a legacy to *C.*, to be paid to her by *B.*, within 12 months after *A.*'s death; and he charged all his estates with the legacy. *C.* died in *A.*'s lifetime. Sir L. Shadwell, V. C., held, that the payment was postponed on account of the circumstances of the estate, and that the legacy vested on the death of the testator. His Honour added, that this case fell within the principle of *Lowther v. Condon*, 2 Atk. 127, and the cases of that class.

Spencer v. Bullock, 2 Ves. 687.

In one case, a testator, after giving legacies to three other children at a future time, gave his residuary personal estate to his executors, to be equally divided among his four children, whom he named; the share of his daughter *J. E.* to be invested for her separate use, for life, and the principal for her children, at her decease, if more than one, share and share alike; provided, that in case any of his children should die before his, her, or their shares should become payable, leaving any child or children of such of his said children who should happen to survive their parent, such child or children should be entitled to their parent's share, equally, if more than one, and if but one, then, the whole to such only child. *J. E.* had three children at the date of the will, and six others afterwards, three of whom died in her lifetime. Sir R. P. Arden, M. R., held, that the bequest vested in those children only who were living at their

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mother's death. The learned Judge observed, that the proviso, though it could not apply to the case of *J. E.*, yet was strong to show the intention; though his opinion was chiefly grounded upon the circumstance of *J. E.* having three children at the date of the will. That if it had vested in them, and they had died before the testator, it would have become lapsed. That the testator could not mean the three then living to take vested interests, which, in case of their death before him, would have made it undisposed of residue; but he was clearly of opinion, that he meant to dispose of that residue: nothing, therefore, vested in the children till the death of their mother.

So far, however, as this decision rests upon the latter Observations ground, it would appear questionable: for, apart from the on *Spencer* proviso, the cases would seem to show, that all the children *v. Bullock*. who were in *esse* at the death of the testator, would take vested interests; and all others born afterwards, would also take vested interests, as soon as they came in *esse*.

RULE V.

Cases of Residuary Bequests on Marriage.

341 In the case of a residuary bequest, where there is no limitation over on the non-happening of the event on which the gift is apparently contingent, the gift of the whole interim income in trust for the residuary legatee, will be a sufficient indication of immediate vesting, though the event specified is that of marriage, unless it is to be with consent: because, where there is no such limitation over, "every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property."

A testator gave the residue of his personal estate, upon *Booth v.* trust, to pay the dividends equally between his grand-*Booth, 4* nieces, *P. B.* and *A. B.*, until their respective marriages; *Ves. 399.* and from and immediately after their respective marriages, [169] to transfer their respective moieties thereof, unto them respectively. *P. B.* died without ever having been married. Sir R. P. Arden, M. R., directed one moiety to be paid to her executors, His Honour being of opinion, that only the payment or actual possession was postponed until the marriages of the grand-nieces, *i. e.*, until the time when the testator thought they would want it. His Honour observed, that every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property. (4 *Ves.* 407.) That *Garbut v. Hilton*, and *Atkins v. Hiccocks*, 1 *Atk.* 381, 500, and *Elton v. Elton*, 3 *Atk.* 504, were cases of a mere legacy, and not of a residue, and then the legacy was given on a marriage with a

given consent, and it was impossible, in that sort of case, to say the legatees could be entitled without that; and that *Batsford v. Kebbell*, was also a mere case of a legacy; whereas, this was in fact an absolute gift of the residue, and accordingly, the testator spoke of it as their shares of the residue.

RULE VI.

Cases of Particular Bequests or Devises where the Period is an Uncertain Period other than that of the Attainment of a given Age.

See § 310. But, in general, neither the disannexing of the 342
See § 328, period from the gift itself, nor the disposition of the
340a. property, or the beneficial interest therein for any special purpose in the meantime, will be a sufficient indication of immediate vesting, where the period is one that may never arrive, unless it is the period of the attainment of a certain age, not being an advanced age, which is regarded in a different light from other uncertain periods or events, because it is most probable, generally speaking, that a person will live to attain the age of 21, or some few years older, and, in fact, that only involves the probable continuance of something which already exists, namely, of a life already commenced.

Where the event may never arrive, there is a 343
strong improbability in supposing that the testator intended the devisee to take a vested interest, and yet to exclude him from the possession till the arrival of the uncertain period: it is more natural to suppose, that the testator intended the interest of the devisee to be contingent until that period should arrive, though, in cases where the bequest is a residuary bequest, and the event is that of marriage, the improbability above mentioned is considered to be overborne by a still stronger improbability.

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RULE VII.

Where the Event of attaining a given Age, is introduced by Words importing a Contingency, and constituting a Condition Precedent.

And as the interest is in general deemed contin- 344
gent, where the period or event to which the devise or bequest has reference, is entirely contingent, so "where a devise has reference to the attainment of a given age, and it is preceded by the conditional expressions, "if," or "in case" he shall attain, &c., instead of being followed by these or any other conditional expressions, or of being preceded by the expressions, "when," "at," "upon," "as

See § 342-3.

See § 290,
298-300.

soon as," "from and after;" or where a *bequest* is either preceded or followed by any one of the conditional expressions, "if," "provided," or "in case he shall attain," &c.; there, inasmuch as the words, "if," "provided," "in case," properly import contingency, the use of these words indicates that the testator considered the attainment of the given age as an event that might never arrive; and hence, notwithstanding the disannexing of the period from the gift, or the existence of a prior devise or bequest, it will be presumed that the testator intended the interest of the devisee to be contingent until the attainment of the age specified,^(u) for the reasons given under the next preceding rule; for holding an interest to be contingent, where the devise or bequest has reference to other events of an entirely contingent character.

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RULE VIII.

Where a Trustee is appointed for the Intermediate Time.

If a bequest be made to children when they shall attain a certain age, and the testator appoints a person to be a trustee for them during the intermediate time, it is a sufficient indication of immediate vesting.

A testator gave to two children, certain personal estate, *Branstrom* when they should attain 21, to be equally divided between v. *Wilkinson*; and she appointed their father in trust for them during their minority. Sir W. Grant, M. R., said, that only the payment was postponed, since the testator would not have appointed a trustee for them of nothing.

SECTION THE FIFTH.

Cases where a Devise has Reference to an Event which would be implied by the Words introducing a Vested Remainder.

346 SUCH words as when, then, after, as soon as, and "even the word if,^(a) or the words in case, though apparently amounting to a condition precedent, which must be performed before a remainder or *quasi* remainder can be come a vested interest, have no other force than to point out the time when the remainder or *quasi* remainder is to be clothed with the possession or enjoyment, in cases where the condition to which they refer, would have been neces-

(u) See *Atkinson v. Turner*, 2 Atk. 41; *Elton v. Elton*, 3 Atk. 504; and *Knight v. Cameron*, 3 Bro. C. C. 471; as stated 1 Rep. Leg. 490, 491; which are cases of personal estate. And see *Fearne*, 246, and *Brownword v. Edwards*, 2 Ves. Sen. 243; as cited *Fearne*, 506, 548, in regard to devises.

(a) *Holcroft's Case*, Moor, 467.

sarily implied without them by the words which usually introduce a vested remainder. Thus,
 Cases from ^bWhere a testator devised to *S.* his son, after 347
Fearne, with the death of his wife; and if his three daughters,
 observations or either of them, should overlive their mother and *S.* their
 thereon. brother and his heirs, they to enjoy the same houses for the
 term of their lives, remainder to *J.* and *W.*; the word heirs
 meant heirs of the body, and the limitation to *J. W.* was a
 vested remainder: (b) because the condition of the daughters
 surviving till the expiration of the preceding estates, would
 have been necessarily implied, inasmuch as their estate in
 remainder was only to be for life, and therefore could not
 take effect at all unless they survived.

[172] And so where a testator devised three houses 348
 to his three children respectively, and willed, that
 if either of his said children should depart this life, then the
 houses so given them should be equally divided between
 them that are living, every child took a particular estate in
 his or her house for life, with a vested remainder to the others
 for their lives. (c) The death of the children was an event
 certain, constituting in itself the boundary of their estates,
 by force of the general limitation implied under the old law.
 (See § 28, 33.) And the survivorship would have been im-
 plied in the words commonly used in introducing a vested
 remainder after a life estate, as the remainders were only
 for life.

See § 170. In both these cases, the remainders depended on 349
 182. no other uncertainty, as to the possession itself,
 than that of their enduring beyond the preceding estate.

Thus, in the first case, the remainder to *J.* and *W.* de-
 pended on no other uncertainty than that of their interests
 continuing, without being annihilated by death, surrender,
 or forfeiture, till the expiration of the preceding estates.

And, in the second case, each child had a remainder in
 the houses of the others, which was sure to take effect in
 possession, if such interest in remainder did not determine
 by his own death, surrender, or forfeiture, before the pre-
 ceding estates of the others.

[173] It was urged that the remainders in the second 350
 case, were remainders to the survivors, and there-
 fore contingent, inasmuch as it was uncertain which of the
 persons would survive. But this case is distinguishable
 from a grant to two for their joint lives, remainder to the
 survivor for life, or in tail; for, here, so long as their joint

(b) *Webb v. Hearing*, Cro. Jac. 415; as stated, *Fearne*, 243. See also
King v. Rumball, Cro. Jac. 448, and *Chadock v. Cowley*, Cro. Jac. 695; as
 stated, *Fearne*, 243. And *Anon. Case*, 2 Ventr. 363; as stated, *Fearne*, 244.

(c) *Fortescue v. Abbot*, Pollex. 479; Sir T. Jones, 79; as stated, *Fearne*, 243.

lives continue, neither can say that he has a remainder: there is but one remainder; and that is contingent on account of the person, apart from the consideration of its duration. In the former case, however, there are as many remainders as there are persons, and each has a remainder, though it cannot take effect in possession unless it endures beyond the others' life interest, that is, unless the person entitled to it survives the other, in whose house the remainder subsists. And the cases above mentioned are also clearly distinguishable from ^a a devise to *M.*, during her natural life; and, from and immediately after her death, to the first son of her body, if living at her death, and the heirs male of such first son; and for default of such issue, to the second son of her body, if living, at the time of her decease, and the heirs male of such second son; and so to the third and other subsequently born sons, in tail male; and for default of such issue, remainder over. (d) For, here, the words "if living at her death," imported a condition precedent, instead of merely expressing that kind of condition which would have been implied without them by the words which usually introduce a vested remainder: because they evidently amounted to the same as the words, "to the first son of her body who shall happen to be living at her death," which would have clearly passed a contingent remainder of the fourth kind, as in that case, the person who would eventually be entitled, could not be ascertained till her decease. See § 84, 187. See § 18.

And where a testatrix gave a legacy, in trust, to pay the interest to *M. S.*, for life, for her separate use; and, after her decease, to divide the capital among her children then living, to be paid at 21; and if there should be no child who should survive *M. S.*, and attain 21, then, to pay the interest to her husband, *R. S.*, for life; and from and after his decease, in case he should become entitled to such interest, then, to divide the principal among the testatrix's first cousins. *M. S.* died without leaving issue, and though the husband died in her lifetime, and therefore never became entitled to the interest, the limitation over was established; Sir W. Grant, *M. R.*, observing, that there was no sense in making the right of the first cousins depend on the husband's taking the interest; and that it was not a condition precedent, but fixing the period at which the legatees over should take, if he ever took. See § 187. *Pearsall v. Simpson*, 15 Ves. 29.

(d) *Denn v. Radcliffe v. Bagshawe*, 6 D. & E. 512; as stated, *Fearne*, 246, note (h).

SECTION THE SIXTH.

Effect of a Limitation over.

I. Where the condition of attaining a certain age is introduced by the words "if," "in case," or "provided," and follows the devise, and there is a devise over simply in the event of the non-attainment of that age.

See § 97-8.

Spring v. Caesar, 1 Roll. Abr. 415, pl. 12.

Edwards v. Hammond, 1 New Rep. 314, as stated, Fearn, [175] 245, note (g).

Broomfield v. Crowder, 1 New Rep. 313, as stated, Fearn, 247, note (k).

Doe d. Planer v. Scudamore, 2 Bos. & Pul. 289.

I. WHERE a testator devises to a person "if," or "in case," or "provided" he lives till a certain age, so that the expressions "if," or "in case," or "provided," do not precede, but follow the devise, and constitute part of the same sentence in which it is made; (See § 297—300, 344) and there is a devise over, simply in the event of his not attaining such age; the conditional expressions are not construed as a condition precedent, but as forming a regular special limitation of the indirect kind, or an irregular limitation, (See § 13, 34—43) amounting to the same as the words, if he should continue to live till, or if he should not die before, he attains 21; and the interest, instead of being a springing interest, or a contingent remainder, (See § 117, 159, 170—176) is held to be a vested interest, either immediate, or in remainder, as the case may be, subject to be divested, as well by the operation of the special limitation, as by the operation of the devise over.

A fine was levied to the use of *A.*, and his heirs, if *B.* did not pay him 20 shillings on the 10th day of September; and if *B.* paid it, to the use of *A.*, for life; remainder to *B.* and his heirs; and it was held not to be a condition precedent, but that the estate in fee vested in *A.* immediately, to be divested on the subsequent payment.

A. surrendered lands to the use of himself, for life; remainder to the use of *J. H.* and his heirs, if it shall happen that the aforesaid *J. H.* shall live to attain the age of 21 years; provided always, and under the condition nevertheless, that if it shall happen that the aforesaid *J. H.* shall die before he attain the age of 21 years, then to remain to the use of *A.* and his heirs. It was held that *J. H.* took a vested interest before 21.

And where a testator devised all his real estate to two, for their lives successively; and, after the decease of the longest liver of them, to *B.*, if he lived to attain the age of 21 years, but not otherwise; and in case he died before he attained that age, then in the manner therein mentioned. The two particular tenants died before *B.* attained 21; and it was held that *B.* took a vested interest, determinable on his dying under 21.

But where a testator devised lands to *G. L.*, his brother and heir at law, for life; and from and immediately after his death, then, he devised the same to *C. B.*, her heirs and assigns, in case she should survive *G. L.*, but not otherwise; and in case *C. B.* should die in the lifetime of *G. L.*, then, he devised the same to *G. L.*, his heirs and assigns. It was

argued that either the devise to *C. B.* was a vested remainder, subject to be divested upon a condition subsequent; like the case of *Edwards v. Hammond*; or that the devise to the heir at law for life was to be considered void, and the devise to *C. B.* considered as an executory devise, to take effect if the heir at law should die before *C. B.* But it was held, that the devise to *C. B.* was a contingent remainder, and was barred by a recovery suffered by *G. L.*, on the ground that it was clear that the event was to happen before the estate should vest, and that a limitation which may be construed as a contingent remainder, shall not be considered as an executory devise.

Now this case may be clearly distinguished from *Edwards v. Hammond*.

351a The event, in that case, namely, the attainment of 21, is one which is often considered as a *quasi* certain event, so that it is not required that the vesting of an estate should be suspended till the happening of such event; it is sufficient if the estate be divested in case it should not happen, especially as that event is not of such a character as to constitute the indispensable pre-requisite to the attaching of any sort of interest in the party; on the contrary, it is rather to be supposed, that the testator, considering it most probable that the party would attain 21, should be maintained in a suitable manner, out of the rents and profits, as he would be if he should take a vested interest, instead of allowing those rents and profits to go to his heir at law, whom he has shown no intention to benefit. But, in the principal case, there was evidently an estate for life, with a contingent remainder to *C. B.* depending on her surviving the tenant for life; with an alternative limitation over, in the event of her dying before the tenant for life. For, *C. B.* was not a relative of the testator, but an unmarried female friend, who resided with him, and superintended his family, and consequently there was more reason for considering her survivorship as a condition precedent, than there would have been if her children or heirs were relatives of the testator. And the reason which existed in the case of *Edwards v. Hammond* for holding the remainder vested, did not apply to this case, as *C. B.* would have been entitled to the rents and profits as soon as *G. L.* died, and no sooner, whether the remainder were vested or contingent.

352 The effect of the devise over upon the prior interest, in such cases as these, is to aid in rendering the prior interest defeasible; and in some cases, also, if the condition referring to the attainment of the specified ages begins with the word "provided," to change that condition from a condition subsequent, properly so called, into an irregular special limitation.

Observations on the preceding cases, showing the principle of the distinction between those cases where the condition is

[176] the attainment of a certain age, and those where the condition is of another kind.

See § 128.

See § 13.

The effect of the devise over in the above cases. See § 7. See § 12, 16. See § 34, 39.

The reason why the interest of the prior devisee, in cases falling within the above rule, is a vested interest. The true reason, it is conceived, why the interest of the prior devisee, in such cases, is a vested interest, is this: The condition, as already observed with regard to cases where there is no devise over, is of such a form, that it may fairly be regarded as a condition, in the widest sense of the term, of that kind which in a preceding page is called an indirect special or collateral limitation, amounting to the same as the words, if he should continue to live till, or if he should not die before, he attains the age of 21 years, and similar, in legal character, to the indirect special or collateral limitation, "to A., if she shall continue a widow." And as it is, in its own nature, capable of this construction, the rule which requires an interest to be construed as vested, if possible, rather than contingent, at once steps in, and imposes upon the Court the duty of holding that the devise takes an immediate vested interest, subject to divestment.

See § 34-43.

See § 200-1.

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The devise over is not in the slightest degree instrumental in aiding the Court in construing the prior interest as vested; much less does it constitute the sole reason of this construction.

Cases where the prior devisee was held to take a vested interest on account of the devise over. There are, however, two cases in which it has been decided, that a vested interest was taken by the prior devisee, where the expressions used were not "if," or "in case," or "provided," but, "when" he shall attain 21, or "at" 21; which were expressions that are not capable of being construed as limitations; (See § 34—42, 298—300), and where there was nothing but the devise over which could justify the Court in construing the interest of the prior devisee to be immediately vested.

Doe d. Hunt v. Moore, 14 East, 601. A testator devised to *J. M.*, when he attained 21, to hold to him his heirs and assigns; but in case he should die before he attained 21, then he devised to his brother when he attained 21, to hold to him his heirs and assigns. It was held, on the authority of *Broomfield v. Crowder*, and other cases, that *J. M.* took an immediate vested interest, subject to be divested upon his dying under 21.

Doe d. Roake v. Nouell, 1 Mau. & Sel. 327; *Randoll d. Doe v. Roake*, 5 Dow. 202. And where a testator devised his estates to *J. R.*, for life; and, on his decease, to and among his children, equally, at the age of 21, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of 21. And in case *J. R.* should die without lawful issue, or such issue should die before 21, then over. Lord Ellenborough, C. J., said, he could see nothing in this devise to distinguish it from *Broomfield v. Crowder*, and *Doe v. Moore*. And it was held by the House of Lords, in affirmance of the judgment of the Court of King's Bench, that the children of *J. R.* took an immediate vested remainder, subject to be divested in the event of their dying under 21.

356 It is with the most unfeigned diffidence, and with But these the greatest reluctance, that the author ventures to cases are not question the soundness of these decisions. But still he can- to be relied not refrain from humbly suggesting, that in deciding these on. cases, upon the supposed authority of *Edwards v. Hammond*, and *Broomfield v. Crowder*, the learned Judges were deciding them upon the authority of cases from which they most materially, though perhaps only technically, differed; [178] and that these decisions ought, at the farthest, to be regarded as authorities, in the determination of future cases, where the terms of the will are precisely the same. And, in fact, it may be questioned, whether they ought not to be altogether disregarded, as founded in a mistaken view of previous cases: for, *debile fundamentum fallit opus*. Indeed, there is little doubt, but that sooner or later they will be disregarded, if not expressly overruled: for, experience has shown, "as a learned author observes, with respect to another point, "that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded on principle." (a)

When we consider the perplexing state of uncertainty and confusion, in which the preliminary part of the learning of conditions exists, even in standard text books, it is not surprising that the existence, in a particular instance, of a condition of that kind, which is, in a preceding page of this Essay, termed an indirect special limitation, should escape See § 7, 3. the notice of those on whom the interpretation of a devise See § 34, 37, devolved. The case of *Randoll v. Doe d. Roake* was de- 42. cided by the House of Lords, in affirmance of the judgment of the Court below; but then it is most material to observe, that it was decided upon the authority of *Doe d. Hunt v. Moore*, as well as the other cases, so that that decision is hardly to be regarded as an independent decision by the House of Lords and the Court below, that the case was analogous to *Edwards v. Hammond*, and *Broomfield v. Crowder*, or that it was, independently of the authority of prior decisions, a case of a vested interest; but rather, as a decision that it was governed by the next preceding case of *Doe d. Hunt v. Moore*, by which indeed it was most undoubtedly governed, if any weight was to be attached to that case. If the case of *Randoll v. Doe d. Roake* had preceded the case of *Doe d. Hunt v. Moore*, there would have been a far greater weight of presumption in its favour; but, as it is, the author humbly submits that it is to be regarded as but little more than a following of a bad precedent. [179]

(a) 2 Jarm. Powell on Devises, 728.

The interest of the prior devisee must have been held contingent, if there had been no devise over; and the devise over could not render it vested. 357

It is perfectly clear, upon principle, and firmly established by authority, that the expressions used in these cases of *Doe d. Hunt v. Moore*, and *Randoll v. Doe d. Roake*, would have amounted to conditions precedent, suspending the vesting, if there had been no devise over. Was, then, a devise simply in the event of the prior devisee dying before 21, and not in the complex event of his dying, without issue, before 21, sufficient entirely to alter the effect of the preceding words? Quite the reverse. For,

II. Effect of a devise over simply on the non-happening of the event on which the prior devise is apparently made contingent. 358

II. A devise or bequest over simply in case of the non-happening of the event on which the prior devise is apparently made contingent, (except in the case of a survivorship clause hereafter mentioned,) affords some degree of presumption, that the prior devise was only to vest on the happening of that event: so that, though, on the one hand, it is not sufficient, of itself, to show that the prior devise is contingent; yet it may be called in aid of other circumstances in evidence thereof.

1. In support of this proposition, we may observe, on the one hand, that where a testator devises to a person when he shall attain a given age, with a devise over in case of his death before that age; and the testator either gives the whole of the intermediate rents and profits to the prior devisee, or leaves him entirely unprovided for in the meantime; there, the devise over will not indeed afford any *necessary* presumption that the testator intended to suspend the vesting of the prior interest till the given age. For, the testator, considering it most probable that the prior devisee would attain the given age, may have intended that he should in the meantime be entitled to the rents and profits; and, with that view, may have intended that he should have a vested interest, subject to be divested in the event of his dying under the given age. And if the testator has expressly given him the whole of the intermediate rents and profits, he *may* have done so, either from ignorance of the fact that the devisee would be entitled to them, as incidental to an immediate vested interest, or from an excess of caution. And if, on the contrary, he has entirely omitted to provide for the devisee in the meantime, he *may* have omitted to do so, because intending the devisee to have a vested interest, he knew that the devisee would be entitled to the intermediate income, as incidental to his vested interest. 359

1. Such a devise over does not afford a necessary presumption that such prior devise is contingent.

[180]

2. But still it affords some pre- 360

But still, on the other hand, though such a devise over does not furnish a necessary presumption, it does so far furnish some degree of presumption, that the

testator intended to suspend the vesting till the given age, supposition that there is a greater probability that such was his intention, where there is such a devise over, than there is where no such devise over exists. Where there is no such devise over, it may with great reason be urged, that if the testator had intended the devise to be contingent until the happening of the event specified, he would naturally have made some provision for the case of that event not happening, and the consequent failure of the interest dependent on the happening of that event; and therefore, that the absence of any such provision furnishes a presumption that he intended such interest to be immediately vested in right, though not to be vested in possession or enjoyment, till the happening of the event specified, or, if vested in possession or enjoyment, to be subject to divestment on its not happening. Whereas, if there is a devise over simply on the non-happening of the event on which the prior devise is apparently made contingent, that argument in favour of the devisee taking a vesting interest is excluded. In such case, the testator expressly gives the property to another on the non-happening of the event; and therefore, so far from there being any reason to think that he considered the prior interest to be vested, as we have seen there would be if there were no devise over; it is *prima facie* rather to be inferred, that he intended the prior interest to be contingent; and considering it to be so, he added a provision for the case of the non-happening of the event, and the failure of the prior interest.

361. But, even admitting that such a devise over affords no reason whatever to suppose that the prior interest is contingent, it certainly affords no reason whatever to suppose the prior interest to be vested; for, if the testator were desirous of preventing an intestacy, or of excluding the residuary devisee from the property comprised in the prior devise, in case of the non-happening of the event specified, he must, in order to accomplish that object, make devise to be a devise over, to take effect in case of the event not happening, whether the prior interest were unquestionably vested, or unquestionably contingent; and consequently such devise over amounts to nothing more than a further disposition, designed as a provision for the case of the non-happening of the event specified, and not in any way tending to explain the nature of the prior interest, as regards vesting, unless, as we have already observed, it be to afford some presumption that such prior interest was intended to be contingent.

362 The proposition in support of which these observations are made, is borne out by authority.

See § 79-81.

See § 97-8.

See § 364-5.

Or, at all events, it affords no ground for supposing [181] such prior vested.

Skey v.
Barnes, 3
Meriv. 335.

A testator gave his personal estate to trustees, upon trust to pay the interest to his daughter *E. S.*, for her life; and, after her decease, to divide the principal among the children of his daughter, and the issue of a deceased child, as she should appoint; and, in default of appointment, to be equally divided between them; the portions of the sons to be paid at 21, and the portions of daughters at 21 or marriage; but in case there should be no such issue of his daughter, or all such issue should die without issue before their portions should become payable, then over. *E. S.* left several children surviving her, one of whom afterwards died unmarried, under 21. Sir W. Grant, M. R., held, that the shares vested immediately, subject to be divested; that the contingency had not happened on which they were to be divested; and consequently, the share of the deceased child passed to her personal representative. His Honour said, that a devise over of the entirety might be called in aid of other circumstances to show that no interest was intended to pass, but that it was not alone sufficient for that purpose, (b) and that though *Scott v. Bargeman*, 2 P. W. 69, would seem to prove the contrary, yet he doubted whether the Reporter had correctly stated the reason on which the decision was grounded.

[182]
Judd v.
Judd, 3
Sim. 525.
Hunter v.
Judd, 4 Sim.
455.

On the other hand, where residuary real and personal estate was given by will to trustees, upon trust to pay the income of one third part to the testator's daughter *S. J.*, for life; and, upon her decease, to stand seised or possessed of the said one third in trust for the child or children of *S. J.*, if more than one, share and share alike, and to be paid, assigned, and transferred to them, upon their respectively attaining 25; but in case *S. J.* should leave but one child her surviving, then, the whole of such one third should go to such only child, upon his or her attaining 25, and be transmissible to his or her heirs, executors, or administrators; and in case *S. J.* should leave no child her surviving, or such child should not attain 25, then, to his two other daughters, or the survivor, and their or her children as therein mentioned. The other two thirds were limited in a similar manner to the other two daughters, except that the words, "and to be paid, assigned, and transferred to them," were not inserted in the limitations in favour of the children of the other two daughters; and the words, "and be transmissible to," were not introduced before the words, "his or her heirs, executors, or administrators," in the limitation in favour of an only surviving child of the second daughter. And, in default of issue of his three children who should attain 25, then his trustees should stand seised or possessed in trust for

(b) See *Deane v. Test*, and *Blease v. Burgh*, *supra*.

his real and personal representatives. Then power was given to the trustees to apply all or any part of the income for the benefit of any child or children who should be under 25. Sir L. Shadwell, V. C., held, that the gift to the children of *S. J.* was void for remoteness. His Honour observed, that the gift, in case *S. J.* should leave one child only her surviving, was clearly contingent on that child attaining 25; and the same construction must be put upon the gift in case she should have more than one child; and when the bequests in favour of the children of the other two daughters were considered, the question was placed beyond all doubt. This decision not being deemed satisfactory, because certain cases, and particularly, *Farmer v. Francis*, 2 Sim. & Stu. 505, had not been cited, the point was again argued, and additional cases were cited. But his Honour observed, that they did not bear any resemblance to the present case; because they were cases of one single gift only: whereas, in this case, the testator's meaning could not be ascertained without taking into consideration the whole will. And he then showed that the second clause giving the property to an only surviving child of *S. J.*, and the gift over to the surviving daughters and their children, and the gift over of the entirety, as well as other parts of the will, completely controlled the first clause, and made it evident, that the children did not take vested interests before they attained 25.

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362a. III. Where, indeed, real or personal estate is given to a class of persons on their attaining a certain age, with a clause of survivorship, providing, that in case of the death of any of them under that age, the share of him, her, or them so dying, shall go to the survivors or survivor; the existence of such clause of survivorship affords some presumption in favour of holding the interests of the class to be vested before the given age, inasmuch as if they were contingent, that clause would be superfluous. But still this presumption is of a very low degree: for, the clause may have been added from excess of caution or from inadvertence. At all events, the presumption thereby afforded is insufficient to overcome the force, or to change the sense, of express words of a known legal import.

III. Devise over to survivors of a class affords some presumption of vesting.

A testator devised a freehold estate to his wife, during her widowhood; remainder to his nephew, for life; remainder to the children of his nephew, in fee, as tenants in common. And, by a codicil of even date with the will, he directed, that neither his nephew nor any issue of his nephew should, by virtue of his will, take a vested interest unless and until they should respectively attain 21; and that in case of the death of any such children under 21, their shares should go to the survivors upon their respectively attaining 21. The nephew, who became the heir at

Russell v. Buchanan, 2 Cramp. & Mees. 561; S. C. 7 Sim. 628.

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law, attained 21, married, and died, leaving five infant children, having made his will, whereby he devised the premises to certain other persons. The Barons of the Exchequer certified that he took a fee, as heir at law, and that the infant children took nothing. The children being dissatisfied with this certificate, applied to the Vice-chancellor, Sir L. Shadwell, that the opinion of another Court of Law might be taken. And it was argued, that, according to the construction adopted by the Court of Exchequer, the survivorship clause would be superfluous; for if the shares did not vest in the children until 21, there could be nothing to go over in the event of their dying under 21; and therefore that the word "vested" meant "absolute and indefeasible." But His Honour said, that the rule, in construing instruments, is to give to the words their natural legal import, although thereby other words may be rendered useless; and that the interests of the children were contingent on their attaining 21, especially as the survivorship clause, though superfluous according to that construction, ended with the words "upon their respectively attaining 21."

IV. Where a prior devise is apparently made contingent on the attainment of a certain age, and there is a devise over on death under that age without issue, after an intermediate devise to the issue.

V. Where a similar prior devise is made, with a similar devise over, but there is no intermediate devise to the issue.

See § 79-81.

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IV. Where the event on which the prior devise is apparently made contingent, is the attainment of a certain age, and there is a limitation to the issue of the prior devisee, in case of his death, under that age, leaving issue; with another limitation over, in case of his death, under that age, without issue; similar observations may be made with regard to the effect of these limitations over, to those which have already been made with respect to the case of a limitation over simply on the non-happening of the event on which the prior devise is apparently made contingent.

V. But where a testator devises or bequeaths real or personal estate to a person "when," or "as soon as" he shall attain, or, "at," or "upon," or "from and after" his attaining a given age, with no limitation to his issue, in case of his death under that age leaving issue, but with a limitation over, in case of his death under that age, and without issue, or (which amounts to the same thing) with a limitation over in case of his death under that age, which is only to take effect if he has no heir, or for default of his issue; in such case, his interest is vested in right, though not in possession or enjoyment before the age specified. In some of these cases, the interim income was given to the devisee, or there were other words rendering it probable that only the actual possession was postponed. But it is conceived that such a limitation over is amply sufficient, of itself, to show that the devisee was to take a vested interest immediately; because the estate is not to go over if he dies under the age specified, leaving

issue; and therefore it must have been intended that he should take a vested interest, in order that his issue might be let in, if he should die under the age specified.

A testator bequeathed the residue of his personal estate to trustees, upon trust to apply so much of the interest and dividends as might be necessary, for the maintenance and education of the children of his daughter, until they should respectively attain the age of 24; and then, upon trust to pay and transfer all the said residue, and the undisposed of interest and dividends, unto and amongst all her said children, when and as they should respectively attain that age; and with benefit of survivorship between them, in case any or either of them should die under that age, and without leaving lawful issue; with a limitation over, in case all of them should die under that age, and without leaving lawful issue. The question was, whether the interests limited to the children were not too remote. Sir John Leach, M. R., held, that the time of payment alone was postponed; and that the children took a vested interest, with an executory devise over, in case of death under 24, without leaving issue: because, in a gift of that nature, he observed, the question whether the time of vesting is postponed, or only the time of payment, depends entirely upon the whole context of the will; and, in that case, the gift over was not simply upon the death under 24, but upon the death under 24, without leaving issue. And he said that all the cases upon the subject, except that of *Bull v. Pritchard*, 1 Russ. 213, before Lord Gifford, were reconcileable with the distinction he took. With regard to that case, it was urged at the Bar, that the implication arising from the peculiar form of the limitation over, was not pressed in the argument, nor noticed in the judgment; and that, in the principal case, it could not be supposed, that the testator intended that if any of the children died under 24, and left issue, the issue should be wholly unprovided for; when the gift over was not to take place if issue was left, at whatever time the death might happen.

Again; a testator, being seised of an undivided third in lands demised to him and two others their heirs and assigns during the lives of certain other persons, devised the same to his sister and nephew, for their joint lives, and to the survivor during his or her life, in case there should happen to be no issue living; but in case both or either of them should leave issue, then to the survivor, one moiety, for life, and the rents and profits of the other moiety to be applied for the maintenance of the children of the sister or nephew so dying during their minorities; and, after the death of the survivor, the other moiety for the maintenance of his or her children during their minorities; and, when and as such

Bland v. Williams, 3 M. & K. 411.

See § 366.

Machin v. Reynolds, 3 Brod. & Bing. 122. [186]

children of the sister and nephew, if any, should attain 21, then, the whole was given to them, as tenants in common in fee; and if but one, to such only child in fee; and in case the sister and nephew should both die without leaving issue, or being such, they should die under 21, and without issue, then over. The Court of Common Pleas certified, that *E. S. M.*, the daughter of *H. M.* the nephew, took, upon the death of the testator, an estate in fee simple in remainder, during the lives of the *cestui que vies*, subject to be divested, in part, by the birth of other children of the nephew and sister, or either of them, and determinable altogether in the event of her dying in the lifetime of *H. M.*, or under age, without leaving issue.

Farmer v. Francis, 2 Bing. 151. and 2 Sim. & Stu. 505.

In another case, a testator gave his residuary real and personal estate, in trust for his wife, for life; remainder for his daughter for life; and, from and after their decease, in trust for, and he thereby devised unto and amongst, all and every the lawful issue, child, or children, of his daughters, as should be living at the decease of the survivor of them his wife and daughter, equally amongst them, if more than one, to be divided share and share alike, when and as they should respectively attain 24, and to their respective heirs, executors, administrators, and assigns, as tenants in common, and if only one; then, the whole thereof to such only or surviving child, his or her heirs, executors, administrators or assigns, upon attaining the said age. But, in case there should be no such issue living at the time of the decease of the survivor of them his said wife or daughter, or being such, all should die without lawful issue, under the age of 24 years, then in trust for, and he thereby gave the property to *E.* and *T. F.* in fee, as tenants in common. The Judges certified, as to the real estate, that the children of the testator's daughter, who were living at the death of the survivor of the wife and daughter, took *estates* in fee, as tenants in common. And Sir John Leach, V. C., held that they took absolute vested interests in the personal estate.

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See § 76.

Murkin v. Phillipsen, 3 M. & K. 257.

So where a testator gave to each of his six grandchildren, a legacy of 50*l.*, when the youngest should come of age; and the said grandchildren to receive the interest of the said 50*l.* until the youngest child should come of age, when an estate should be sold, out of the produce of which, he, in a subsequent part of his will, directed the legacies to be paid. If either of those children should not live to come of age, nor have an heir born in wedlock, the said 50*l.* to be equally divided among the surviving children. One of the grandchildren married during her minority, but afterwards attained 21, and died, leaving a child, before the youngest grandchild attained that age. It was held, that she took an immediate vested interest in the legacy. Sir John Leach, M. R., said,

"In this case, there is no direct gift until the youngest grandchild attains the age of 21 years: but, inasmuch as interest on the legacy is given in the meantime from the death of the testator, this, if it were given out of personal estate, would be considered as an immediate vested interest, and will be so considered in the present case, if, upon the whole will, it should appear that the legacy does not sink into the land. The payment of these legacies might well have been postponed only for the convenience of the estate, and if that were so, the case would not be within the principle that the legacy lapses for the benefit of the land. There is moreover great weight in the argument, that the legacy would not sink into the land, because the testator has directed, that if any of the six grandchildren should die under the age of 21, without leaving an heir born in wedlock, the legacy should vest in the survivors. In that case, the testator has declared, that the legacy shall not sink into the land; and, *a fortiori*, it must be intended, according to the principle of Lord Hardwicke, in *Lowther v. Condon*, that he could not mean the legacy to sink into the land, when a grandchild attained 21, and died, leaving a child born in wedlock."

And where a testator devised his real and personal estate to trustees, upon trust, as to a certain estate, to convey and assure the same to *G. H. A.* when and so soon as he should attain 21, and also to pay to *G. H. A.* 7000*l.* upon his attaining 21. But, in case *G. H. A.* should die without issue before attaining 21, then, the said estate, together with the said sum of 7000*l.*, was to sink into, and become part of, the residue. And he gave the residue to another, in a different form of words, which were held to create a contingent interest, depending on the attainment of the age of 21 years. Sir L. Shadwell, V. C., on the authority of *Brooksfield v. Crowder*, *Doe v. Moore*, and *Doe v. Nowell*, held, that *G. H. A.* took an immediate vested interest, liable only to be divested; and consequently that he was entitled to the rents and profits of the estate, though he had not yet attained 21. The case was carried by appeal to the House of Lords; but judgment has never been given, the parties, it is understood, having entered into an arrangement. But, in support of the view of the case which the Vice-Chancellor took, it was urged, both before him and in the House of Lords, that it was manifest that the testator did not intend the property to go over, if *G. H. A.* died under 21, leaving issue. That the issue, however, could not take except through him, and he must be seised of some estate which they could inherit. And that it was necessary, therefore, that *G. H. A.* should take an immediate vested fee, to enable him, if he should die under 21, to transmit the property to his issue.

Warter v.
Warter, 2
Bro. & Bing.
349.

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And so where a testator devised lands to trustees and their heirs and assigns, until *J. W.*, the son of his sister, *M. W.*, should attain 21, and, if he should die in the meantime, until *H. J.*, second son of *M. W.*, should attain 21, and, if *H. J.* should die in the meantime, until the daughter of *M. W.* should arrive at that age; upon trust, among other things, for the maintenance and education of *J. W.*, till he should arrive at 21; and, when *J. W.* should attain that age, to pay him the residue of the rents, if any; and, if *J. W.* should die before 21, then for the maintenance and education of *H. J.*, till he should arrive at 21; and, when *H. W.* should arrive at that age, to pay him the residue of the rents, if any; and, when and as soon as *J. W.* should attain 21, or, in case of his death, when and as soon as *H. W.* should arrive at that age, or, in case of his death, when and as soon as the daughter of *M. W.* should arrive at 21, he devised the premises to the trustees, their heirs and assigns, to the use of *J. W.* and his issue in strict settlement; and, for default of such issue, to the use of *H. W.* and his issue in strict settlement; and, in default of such issue, to the use of the daughter of *M. W.* and her issue, in like manner. And the testator directed, that his furniture and plate should remain in his house as heir looms. The Court of Common Pleas certified, that, upon the death of *J. W.*, under the age of 21 years, *M. E. M. W.*, his only child, became entitled, as tenant in tail male, of the real estate, and as absolute owner of the heir looms; and that she became so entitled immediately upon the death of *J. W.*; and that the personal representative of *J. W.* was entitled to the savings of the rents and profits accrued in the lifetime of *J. W.*

VI. Where the attainment of a certain age forms part of the description of the legatee or devisee.
Bull v. Pritchard,
1 Russ. 213.

VI. But where the attainment of a certain age 366 forms part of the original description of a devisee or legatee, (See § 281—4) the vesting is suspended till the attainment of that age, even though the limitation over is only to take effect in case of his death under that age, without issue.

Leaseholds and residuary personal estate were devised and bequeathed, in trust, after a life interest to the testator's daughter, for the children of his daughter who should attain the age of 23, share and share alike, with benefit of survivorship, in case of the death of any or either of them under that age; and, in case there should be but one child, then, in trust for such only child; and, in case there should be no such child or children, or, being such, all of them should die under the age of 23 years, without lawful issue, then upon trust for the testator's brother and sisters. The testator's daughter had, at the time of his decease, an only daughter, who was then about 15 years of age, and died under the age of 23 years, without issue. It was held, that the attain-

ment of 23 years was made a condition precedent to the vesting of any interest in the children; so that the vesting of the interests of any unborn children might not take place till more than 21 years after a life in being; that the Court could not distinguish between children born in the life-time of the testator, and those who were or might be born afterwards; nor could it qualify the words, "in case there should be no such child," by adding the words, "living at the death of the tenant for life," the testator's daughter; and therefore all the limitations after her death were void: the limitation to the children was void, because it was to vest on too remote an event; and the bequest over to the brother and sisters of the testator was void, because it was to take effect on one of two conditions; and the first of those conditions could never take place, since there *had been issue*; and the second required the occurrence of an event which was too remote, namely, the children dying without issue, under 23.

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SECTION THE SEVENTH.

Of the Effect of Subsequent Explanatory Words.

366a AN interest which, according to the form of its limitation, is most undoubtedly a vested interest, may be rendered contingent by subsequent explanatory words, so long as they afford a necessary, though not perhaps an obvious, inference, that such interest was not intended to be a vested interest.

A testator devised real estate, after the decease of his daughter, to her second, third, fourth, and every younger child or children, as tenants in common; but, in case his daughter should die leaving no issue, or if his daughter's second, third, fourth, and every other child should not attain his, her, or their respective age or ages of 21 years, and should not be married before such age with the consent of his the testator's son and daughter, and the survivor of them, then he devised his estate over. He then directed, that the consent should be testified in a particular manner; and added—"otherwise such child or children shall not have or receive any benefit from this my will." The devise to them as tenants in common would have given them a vested interest immediately, subject to be divested by the operation of the conditional limitation, in the event of their dying under 21 without having been married with consent. But the subsequent words prevented them from taking a vested interest immediately; because, from such interest they would be entitled to maintenance, and would consequently take a benefit under the will, even though they might marry before 21 without consent, or die before that

Critchett v. Tagnton, 1 Russ. & M. 541.

See § 97-8.
See § 148-9.

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age unmarried. The subsequent words served to render the limitation to the children dependent, for its vesting, upon the event, as a condition precedent, of their attaining 21, or marrying with consent before 21.

See § 13.

SECTION THE EIGHTH.

Of the Effect of an Allowance for Maintenance.

I. Where the whole intermediate income is given, and there is no limitation over. See § 328-338. I. We have seen, that, in general, a gift of the whole intermediate income, for the maintenance or benefit of the person to whom real estate, or personal estate not arising from charges on land, is devised or bequeathed, on the attainment of a certain age, is, in consequence of the strong leaning in favour of vesting, construed a sufficient indication of immediate vesting, where there is no limitation over in case of the death of the party under that age. 367

II. Where there is a limitation over. II. But, where there is such a limitation over, the indication of vesting furnished by the gift of the whole intermediate income, is so far countervailed by the limitation over, as not to be sufficient evidence of vesting.* 368

Vawdry v. Geddes, 1 Russ. & M. 203.

A testatrix gave the interest of her residuary estate to her four sisters, during their lives; and directed, that, on their deaths, the interest of their respective shares, should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit, of the children of each of them so dying, until such children should severally attain the age of 22 years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of either of them under that age. The sisters had several children, born in the testatrix's lifetime. Sir John Leach, M. R., said: "I am not able to distinguish this case from the residuary gift in *Leake v. Robinson*. . . . In that case, Sir William Grant proceeds upon this principle—that the prescribed time cannot be considered as marking only a time of postponed payment; because, there is no antecedent gift—no gift but in the direction to pay at the particular period. . . . If the whole interest had been expressly given to the children until they attained 22, I do not agree that the shares of the children would therefore have vested, subject to be divested. The case of *Bataford v. Kebbell*, which is referred to by Sir William Grant in *Leake v. Robinson*, is an authority directly in point against that proposition. Where interim interest

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* But see *Doe d. Dolly v. Ward*, stated § 331; which, however, was decided on the authority of *Randall v. Doe d. Roake*, a case that cannot be relied on. (See § 351-362.)

is given, it is presumed the testator meant an immediate gift; because, for the purpose of interest the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely, when the testator has expressly declared that the legacy is to go over, in case of the death of the legatee before a particular period. I speak here of gifts of personal estate, and not of real estate. The language of this will gives an equal interest to all the children of the sisters, whether born before or after the death of the testatrix.—The statute of accumulation, (39 & 40 Geo. III., under or by analogy to which, it was contended, that the accumulation might be good for 21 years,) was passed subsequently to the death of the testatrix, and can have no effect upon this will. My opinion, therefore, is, that the gifts over to the children of the sisters, whether born before or after the death of the testatrix, not being to take effect until the age of 23, are too remote and void.”

369 III. If a part only of the intermediate income is given for the maintenance or benefit of the person part only of to whom such a devise or bequest is made, this furnishes no the intermediate presumption in favour of vesting: on the contrary, as the testator expressly provides a less sum for his support, than he would be entitled to by mere consequence of law, if his interest were vested; there is a presumption against vesting, rather than for it.

SECTION THE NINTH.

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Of the Effect of a Power of Appointment over Real Estate.

369a *WHERE real estate is subjected to a power of appointment in the first taker, with remainders over in default of such appointment; the power does not suspend the vesting of the remainders over, but such remainders vest subject to be divested by the exercise of the power, whether the power is a power of appointing any estate or interest generally, or whether it is expressly and restrictively a power of appointing in fee.(a)

(a) See *Fearne*, 226—233; and *Cunningham v. Moody*, 1 Ves. Sen. 174; and *Doe d. Willis v. Martin*, 4 D. & E. 39, as there stated; overruling the opinion of the Chief Justice in *Leonard Lovie's Case*, 10 Co. Rep. 85; and of Lord Hardwicke in *Walpole v. Lord Conway*, Barn. Ch. Rep. 153. See also *Smith v. Lord Camelford*, 2 Ves. Jun. 698; and *Maunderell v. Maunderell*, 7 Ves. 567, 10 Ves. 246.

SECTION THE TENTH.

Of the Effect of a Power of Appointment over Personal Estate.

I. Gifts to a class subject to a power of appointing among them generally. I. * **WHERE**, by will or settlement, legacies or portions are directly given to a class of individuals, subject to a power of appointing the property among them generally, the persons answering the description, as they come in *esse*, during the life of the donee of the power, take vested interests, in equal shares, subject to be divested only as regards the amount of their respective shares, by the exercise of the power; or, in the case of any one or more of them who happen to die in the lifetime of the donee of the power, subject to be divested, as regards the share or shares of the person or persons so dying, by an instrument in exercise of the power, appointing the whole fund among the survivors. So that,

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1. Where no valid appointment is made, or only a partial appointment.

2. Where a valid appointment is made of the whole.

1. If no valid appointment, or merely an appointment of a part of the property, is made, the fund, or so much of it as is not effectually appointed, belongs, in equal proportions, to the legatees or donees living at the death of the donee of the power, and to the personal representatives of those who happen to be then dead.

2. But, on the other hand, if the power is properly exercised, the share or shares of one or more of them may be partially divested and diminished, in favour of the others or other of them, by the exercise of the power; and in case of the death of any one or more of them in the lifetime of the donee of the power, he may appoint the whole fund among the survivors, so as entirely to divest the share or shares of the person or persons so dying. (a)

II. Where the power authorizes a selection, and there is a limitation in default of appointment.

II. And, where the power is not a mere power of appointing to the class generally, but authorizes the donee thereof either to appoint to all or to select some of them in exclusion of others; (as where it is a power of appointing to such of them as he shall think proper;) and there is a limitation to the whole class in default of appointment; they take vested interests, in equal shares, but the

(a) See 1 Rop. Leg. by White, 537—541, and cases there stated; viz., *Malim v. Keighley*, and *Malim v. Barker*, 2 Ves. Jun. 333, 506, and 3 Ves. 150; *Bristow v. Warde*, 2 Ves. Jun. 336; *Wilson v. Pigott*, 2 Ves. Jun. 351. The same learned author also refers to *Witts v. Boddington*, 3 Bro. C. C. 95, ed. by Belt; *Robinson v. Smith*, 6 Mad. 194; *Gordon v. Levi*, Amb. 364; *Doe v. Martin*, 4 T. R. 39; 64; *Smith v. Camelford*, 2 Ves. Jun. 698; *Vanderzee v. Aclom*, 4 Ves. 771; *Butcher v. Butcher*, 9 Ves. 362; 1 Ves. & Bea. 78, 99; S. C. 1 Scho. & Lefroy, 293; *Vane v. Lord Duncannon*, 2 Scho. & Lefroy, 118.

share of each is subject to a partial or total divestment in favour of the others.

374 III. But, ^b where legacies or portions are given to such of a certain class of individuals as a particular person shall appoint; and there is no limitation to any of them in default of appointment; the legacies or portions will necessarily be contingent until the donee of the power shall have exercised it, so as to designate and ascertain the individuals who are to take. (b)

III. Where the gift is to such of a class as a person shall appoint; and there is no limitation in default of appointment. [195]

CHAPTER THE NINTH.

[196.]

CERTAIN CASES OF INTERESTS UNDER LIMITATIONS OF THE WHOLE OR OF THE IMMEDIATE PART OF A REVERSION, DISTINGUISHED FROM CONTINGENT REMAINDERS OF THE THIRD CLASS, AND FROM SPRINGING INTERESTS.

376 I. Where a person takes a life estate under one instrument, and by a subsequent instrument, a life estate is created in favour of another person, with a remainder over after the death of both of these persons; in such case, the remainder over is a grant or devise of the reversion or of the immediate part of the reversion, being limited to take effect in possession immediately after the regular expiration of the life estate created by the previous instrument, and of the other life estate created by the subsequent instrument. Although, if the existence of the first of these life estates had not been known, the remainder over would have justly been considered to be a contingent remainder of the third class.

^a Thus, where *A.* made a feoffment to the use of himself for life, and, after the death of *A.* and *M.* his wife, to the use of *B.*, eldest son of *A.*, for his life; this was held a contingent remainder in *B.* But as it afterwards appeared, that, by a former deed, *M.* had an estate for life; Lord C. J. Hale held, that it was not a remainder, but a conveyance of the then subsisting reversion expectant on the death of *M.* (a)

376 II. Where an estate is limited to a person after

(b) See 1 Rep. Leg. by White, 541—543; and *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61, 74, 81, as there stated. The same learned author also refers to 2 Ves. Sen. 208; Ambl. 365; and 1 Ves. Sen. 210.

(a) *Weal v. Lower*, Pollexf. 63; as stated, Fearn, 303.

of a spring- the death of another who takes a life estate under a pre-
ing interest. vious instrument; this, of course, is a grant or devise of
[197] the reversion, or of the immediate part of the reversion:
See § 169. but, yet, if the existence of such life estate were not
See § 117-9. known, it would be properly considered to be a springing
interest.

Observations It will be obvious from these distinctions, that 377
grounded on wherever an interest is postponed till after the
the foregoing death of a person who takes no life interest under the same
distinctions: instrument; in judging of the limitations contained in such
instrument, it is necessary to inquire whether or not such
person takes a life interest under any previous instru-
ment.

III. Where a III. ^b Where an estate tail general is limited to 378
limitation is a person by one instrument, and then, by a subse-
to take effect quent instrument, an estate is limited to take to effect on an
on an indefi- indefinite failure of his issue generally; or, where an estate
nite failure tail restricted to a certain description of descendants, is
of issue who limited to a person by one instrument, and then, by a dif-
are all in- ferent instrument, an estate is limited to take effect on an
heritable indefinite failure of his issue of the same description; in
under estates either case the limitation in the subsequent instrument is an
tail created immediate grant or devise of the reversion or of the imme-
by a previous diate part of the reversion, (b) though, if the existence of the
instrument; previous estate tail were not known, it would be rightly
and such li- considered as an executory grant or devise of a springing
mitation is a interest, and therefore as void for remoteness. (§ 706, 714.)
limitation of
the whole or the immediate part of the reversion.

IV. Where a IV. But, where an estate is created out of a 379
limitation is reversion expectant on the expiration of an estate
to take effect tail limited by a previous instrument; and such estate so
on an indefi- created out of the reversion, is, in reality and not merely
nite failure of apparently, limited to take effect on an indefinite failure of
issue, some issue generally, or issue of a given description, and that
of whom are failure could or might not take place till a period subse-
not inherit- quent to the regular expiration of the estates tail, in conse-
able under quence of all such issue not being inheritable under such
such estates estates tail; such limitation on an indefinite failure of issue
tail; and is a limitation of a springing interest out of the reversion,
such limita- and therefore void for remoteness. As ^c where estates tail
tion is a limi- male are limited, by marriage settlement, to the first and
tation of a other sons of a person by that marriage, and then, by a sub-
[198] sequent will, a devise is made of the property so entailed,
springing in- which is not to take effect except on an indefinite failure of
terest.
See § 117, 126, 706, 714.

(b) See Fearn, 449.

his issue generally(c) or his issue male; and *not merely on failure of their issue male, or on failure of his issue male, in the alternative.(d)

380 An exception occurs, however, where the possible interval between such an indefinite failure of issue and the regular expiration of such estates tail, may be filled up by implying an estate tail, so as to support the subsequent limitation on such an indefinite failure of issue, as a remainder created out of the reversion. Exception, where the interval maybe filled up by implication. See § 159.

But there cannot be such an implication where the limitation on failure of issue is by devise, and the person whose failure of issue is spoken of, neither takes any estate under the will, nor is the heir apparent or heir presumptive of the testator. Nor can it exist where the person whose failure of issue is spoken of, is the deviser himself; because he is dead when the will takes effect. Where such implication does not arise. See § 585-9.

A testator having a reversion expectant upon a life-estate, in his wife, under his marriage settlement, and upon interests, under limitations, which, being only to his sons in tail male, with remainder to his daughters in tail general, would not have carried the estate to the female issue of the sons, made his will, whereby, after reciting that he was seised of the reversion in fee expectant upon, and to take effect in possession immediately after, the decease of his wife, in case there should be no child or children of his wife by him, or, there being such, all of them should happen to depart this life without issue, of and in divers messuages, he proceeded to devise the same, in case he should die without leaving any children, or child, or, there being such; all of them shall happen to depart this life without issue. The Vice-Chancellor decided, that the devise of the reversion was void, as being too remote. And this decision was affirmed by the House of Lords. The reasons in support of the decree of the Vice-Chancellor were the following: "Because, if the devises in question were valid in law, they must take effect either as immediate devises of the reversion, or as executory devises. But, as immediate devises of the reversion, they cannot take effect; since they are not limited to take effect till after the failure of the whole of the testator's issue, or, at least, of his whole issue by his then wife, some of which issue, that is to say, the daughters of his sons and their descendants, could take no estates under the testator's marriage settlement. The devises, therefore, are not so limited as to take effect at all events immediately upon the expiration of the particular estates limited by the settlement: nor

Banks v. Holme, 1 Russ. 394.

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(c) *Lady Lanesborough v. Fox*, Cas. temp. Talb. 262; as stated and commented on, Fearn, 448—9.

(d) *Sanford v. Irby*, 3 Bar. & Ald. 654.

can any limitations be implied in favour of the testator's issue by his then wife unprovided for by the settlement; since it appears, from the recital of the settlement contained in the will, that the testator conceived that all his issue by his then wife were provided for by the settlement, and he therefore cannot be taken to have intended to have provided for any such issue out of the settled estates by his will. And, as executory devises, the devises in question cannot take effect; because they are limited to take effect after a general failure of the testator's issue, or, at least his issue by his then wife, and are therefore void in law, as being too remote. The testator, according to the plain construction of his will, does not profess to devise, nor is it in the least probable that he could have intended to devise his estates in the county of York to his collateral kinsmen, in exclusion of any of his own issue; and therefore it must be understood, according to the literal language of the will, that the devisees were not to take until failure of all the testator's issue by his then wife or any future wife (or at least all his issue by his then wife), as well those provided for, as those unprovided for by the settlement."

V. Where a limitation is made of the reversion, *eo nomine*, on [200] an indefinite failure of issue, some of whom are not inheritable under such estates tail; and such limitation is a limitation of the whole or the immediate part of the reversion.

See § 169.

Egerton v. Jones, 3 Sim. 409.

V. From cases of this kind, however, we must be careful to distinguish those where estates tail are created by a previous instrument, and the ancestor, to whose children such estates tail are given, devises the reversion, *eo nomine*, on an indefinite failure of issue generally, or of issue of a certain description, some of whom are not inheritable under the entail previously created; and there is no intent manifested, in any other part of the will, to postpone the devise to such indefinite failure of issue. In such case, the devise will be held to be an immediate devise of or out of the reversion; because, as the testator first devises the reversion, which is a sufficient description in itself, and that devise would, of course, in itself, pass an interest which would take effect in possession immediately after the regular expiration of the previously created estates; the effect of that devise is not destroyed by words which may be regarded as merely superadded to the principal description, for the purpose of explaining what was the nature, as he erroneously supposed, of the reversion to which he was entitled, and which he intended to devise.

An estate at C. was settled on A., for life; remainder to his first and other sons, in tail male; remainder to A., in fee. A. devised as follows: "As to the reversion and inheritance of the freehold estate at C. purchased by me in pursuance of my marriage articles, in case of failure of issue of my body by my said wife, I give and dispose thereof in manner following; that is to say, I devise the same to my brother, &c." The estate in tail male in the first and other sons of A. being

determined, the heir at law of A., apprehending that the devise was void for remoteness, contracted to sell the estate. The Master having reported in favour of the title made out under the heir at law, the purchaser excepted to the report, on the ground that the devise was good, or that, at least, it was doubtful whether it was not good. Sir L. Shadwell, V. C., said, "In cases like the present, it is always a question, whether the testator has described inaccurately what he meant to dispose of, or has made the contingency a part of the devise. It appears to me that, in this case, the testator has used the words, "in case of failure of issue of my body by my said wife," as a description of the thing he meant to dispose of: and therefore, if I were compelled to decide the point, I should hold, that the devise in question is good; and consequently I cannot force the purchaser to take this title."

382 VI. Where estates tail are created, by a deed or [201] will, in favour of the children of a particular marriage, and then the ancestor to whose children such estates tail are given, makes a devise of the hereditaments so entailed, to take effect on an indefinite failure of his issue; generally, or without restriction to his issue by such marriage, or on an indefinite failure of the issue of his sons, daughters, or children, generally, in such case, if his wife is still living, by whom he had the children who take the previous estates tail, and there is anything, on the face of the will, to show that he contemplated her surviving him, (*such as the appointing her executrix, or making any disposition in her favour,) (e) it will be considered that he had no other marriage in contemplation, and that, consequently, the devise is a devise of the whole or the immediate part of the reversion, instead of a limitation of a springing interest. (See § 169, 117, 125.)

was contemplated, and therefore such limitation is a limitation of the whole or the immediate part of the reversion.

(e) *Jones v. Morgan*, as stated, Fearn, 451. *Lytton v. Lytton*, 4 Bro. C. C. 441; as stated, Fearn, 454, note (c).

CHAPTER THE TENTH.

OF LIMITATIONS TO THE HEIR OR HEIRS OF A LIVING PERSON, CONSIDERED IN RELATION TO THE FOURTH CLASS OF CONTINGENT REMAINDERS: AND, FIRST,

OF SUCH LIMITATIONS, WHEN THEY PRIMA FACIE FALL WITHIN THE DESCRIPTION OF THAT CLASS, BUT IN REALITY DO NOT COME WITHIN IT; THE WORD HEIR MEANING HEIR APPARENT OR PRESUMPTIVE, AND THE WORD HEIRS MEANING SONS, DAUGHTERS, OR CHILDREN.

Strict sense of the word heir.

A remainder to the heirs of a living person is a limitation to a person not in being, or, if in being, not ascertained.

THE word "heir," in its strict legal sense, denotes 383 the person upon whom the law casts the inheritance, on the decease of the ancestor. Hence the maxim is, that *nemo est hæres viventis*; and consequently, a remainder which is limited to the heirs of a living person, is a remainder limited to one who is not yet in existence; since no one sustaining the legal character of heir of a certain person, can be in existence till that person's death.

And admitting though there can be no heir till 384 the ancestor's decease, yet the person who will eventually be heir, is in being; still, it is uncertain whether the person who would be heir, if the ancestor were to die at a particular time, may not die before the ancestor; or, if such person is only heir presumptive, whether he may not be displaced by the birth of a nearer relative; and therefore, the person who will eventually be heir, is one who, even if he is in being, cannot be ascertained till the moment of the ancestor's decease.

And hence such remainder is a contingent remainder of

Hence, as a general rule, a remainder limited to 385 the heir or heirs of a living person, falls within the description of, and really is, a contingent remainder of the fourth class. But,

[203] the fourth class. But, I. Sometimes it does not fall within the description of that class.

I. There are cases in which such remainders do 386 not, in reality, within the description of the fourth or any other class of contingent remainders, though, *prima facie*, as being limited to the heir or heirs of a living person, they seem clearly to fall within it.

1. Where the word heirs is used for sons, daughters, or children.

1. This happens where the same persons who 387 are designated "heirs," are, in another sentence, referred to by the description of sons, daughters, or children, or the testator having sons or children at the time; or other

expressions are added, which show that the testator used the term "heirs," not in its technical sense, but as a synonyme for the first and other sons, to take successive remainders in tail, or for the children, to take as joint tenants or tenants in common.

Thus, where a testator devised in trust for the maintenance of *S.* a feme covert, and the issue of her body during the life of *S.*; and after her decease, in trust for the use of the heirs of the body of *S.*, their heirs and assigns for ever, without any respect to seniority of age or priority of birth; and in default of such issue, then over. It was admitted that the remainder was legal, while the preceding estate was equitable. And it was held, that *S.* took for life only, with remainder to her children as joint tenants. *Doe d. Hallen v. Ironmonger*, 3 East, 583.

388 2. "Such also is the case where it appears from other expressions, that the testator uses the term "heir" to denote the individual, who, at the time of the making of the will, is the heir apparent or heir presumptive of a particular person. (a)

389 II. Again; there are other cases, in which remainders to the heir or heirs of a living person, do fall within the description of the fourth class of contingent remainders, but yet, in consequence of the application of certain rules of law, they constitute exceptions from that class of contingent remainders. The cases of this kind are those which are affected by the rule which rendered a limitation to the heirs of the grantor inoperative, and those which are governed by the rule in *Shelley's Case*; which form the respective subjects of the two following chapters.

II. In some other cases, the remainder does fall within the description of, but yet constitutes an exception from, the fourth class of contingent remainders. [204]

CHAPTER THE ELEVENTH. [205]

FIRST EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, IN THE CASE OF AN ULTIMATE LIMITATION TO THE RIGHT HEIRS OF THE GRANTOR.

IN the preceding chapter, we have seen that, as a general rule, a remainder limited to the heirs of a living person, falls within the description of, and really is, a contingent remainder of the fourth class.

(a) *Burchett v. Durdant*, 2 Vent. 311; *James v. Richardson*, 1 Bro. Parl. Ca. 493; *Darbison d. Long v. Beaumont*, 1 P. W. 229; 1 Bro. Parl. Ca. 489; and *Goodright d. Broking v. White*, 2 Blac. Rep. 1010; as stated, *Fearn*, 210—212.

Limitations to the right heirs of the grantor before stat. 3 & 4 Will. IV. c. 106. But, prior to a modern statute, *if an ultimate limitation was made to the right heirs of the grantor, it did not give a contingent remainder to the heir at law as a purchaser, but was entirely inoperative, the ultimate interest remaining in the grantor, as his ancient reversion, and passing to his right heirs in the ordinary course of descent.^(a) This exception is founded on reasons similar to those assigned in the next chapter for the exception therein discussed. 390

Enactment of stat. 3 & 4 Will. IV. c. 106, s. 3. By the stat. 3 & 4 Will. IV. c. 106, s. 3, it is, however, enacted, that "when any land shall have been limited by any assurance executed after the 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof." 391

[206] CHAPTER THE TWELFTH.

SECOND EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, CREATED BY THE RULE IN *SHELLEY'S CASE*, WHERE REAL PROPERTY IS LIMITED TO A PERSON, WITH REMAINDER TO HIS HEIRS.

A remainder to the heirs of a living person is a contingent remainder. We have seen, in the tenth chapter, that, as a general rule, a remainder limited to the heirs of a living person, falls within the description of, and really is, a contingent remainder of the fourth class. 392

But an exception is created by the rule in *Shelley's Case*. There is, however, a well known exception to this, created by the rule in *Shelley's Case*.

SECTION THE FIRST.

The Rule in Shelley's Case Stated.

Shelley's Case. In *Shelley's Case*, a fine was levied by a man to the use of himself for life, remainder to the use of the heirs male of his body and the heirs male of the body of such heirs male. 1 Co. Rep. 98. 393

What is meant by the is a rule of great antiquity, by which the word And the rule called the Rule in *Shelley's Case*, 394

(a) *Fenwick v. Mifforth*, Moor, 284; *Earl of Bedford's Case*, Moor, 718; and *Read and Morpeth v. Erington*, Cro. Eliz, 321; as stated, Fearn, 51.

heirs, in remainders to the heirs of a tenant for life or in Rule in *Shelley's Case*, is construed as a word of limitation, and which was referred to by the defendant's counsel in that case, to show that the heirs males of the body of Edward Shelley did not take by purchase, but by descent.

395 The Rule is expressed by him in the following terms:—"It is a rule of law, that when the ancestor by any gift or conveyance takes an estate of freehold, and, in the same gift or conveyance (a) an estate is limited, either mediately or immediately, to his heirs, in fee, or in tail, that always, in such cases, the heirs are words of limitation of the estate, and not words of purchase."

396 Several earlier cases in the Year Books in the time of Edward III., are referred to in Lord Coke's Report; but Mr. Preston observes, the only one among them which is intelligible, is, that of the *Provost of Beverly, v. of Beverly's Case*, which arose upon a fine *sur grant et render*, by which lands were settled upon John Sutton, the granting party in the fine, for his life; remainder, after his death, to John his son, and to Eline his wife, and the heirs of their bodies begotten; and, for default of such issue, remainder to the right heirs of John the father. John the father was dead, and John the son and Eline were also dead, without issue. Richard, another son of John the father, entered, claiming as a purchaser under the limitation to the right heirs of his father. Thorpe, in answer to the plaintiff's counsel, observed, "Your title is *as heir* to your father; and your father had the *freehold preceding*; . . . and the remainder was *not* at all limited to *you* by your *proper* name, but *as heir*." And, for these reasons, it was decided that Richard took by descent. (b)

397 Such is the rule of law indirectly pointed out in this case, and formerly stated in *Shelley's Case*, on the virtual from which it has received its name. And it is indispensably necessary here to observe, that it would have been well if the profession, when they have considered the nature and extent of the Rule in *Shelley's Case*, had always really considered the nature and extent of *that* Rule, as pointed out and expressed in the two cases above mentioned, instead of laying down, or presupposing the existence of a Rule, which, though termed the Rule in *Shelley's Case*, is in reality a translation of that Rule into terms of a far different and more extensive character; embracing cases, where the words "issue," "children," "sons," and "daughters," have been used instead of the word "heirs." These words

(a) See Fearn, 71; and *Doe d. Fonnereau v. Fonnereau*, Doug. Rep. 486, as stated, Fearn, 78.

(b) Pres. View of Rule, 50, 52.

may indeed have been used in ignorance as synonyms for the technical word heirs; but still, not having the same technical import as that word, they have been differently construed.

The Rule may be differently stated, without losing its identity; as it is by Lord Coke.

True it is that the Rule may be expressed in different and in more or less precise terms, without destroying its identity. And we find Lord Coke himself wording it in different ways, in different parts of his commentary. Thus, in one place, he says, "Where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heirs, the fee simple vested in himself, as well as if it had been limited to him and his heirs: for, his right heirs are in this case words of limitation of estate, and not of purchase."^(c) While, in another passage, he gives the same Rule as follows:—Whenever the ancestor taketh any estate of freehold, a limitation after, in the same conveyance, to any of his heirs, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder."^(d)

Lord Coke retains the two essential requisites thereof.

But amidst this variety in other respects, the two essential requisites pointed out by the counsel in the Case of the *Provost of Beverly* and in *Shelley's Case*, are retained by Lord Coke; namely, a prior limitation of the freehold to the ancestor; and a subsequent limitation to his "heirs," by that designation, and in that character.

Another statement of the Rule.

It is the design of the present chapter, to point out the nature, application, and reasons of the Rule referred to in *Shelley's Case*, and not of some other Rule, designated by that name, indeed, but being in fact of far greater extent; and in pursuance of this, the author ventures to lay down that Rule in terms, which, retaining all the essential ingredients, may perhaps serve to express substantially the same Rule, in a somewhat more plain and definite manner, and in such a way as to exclude certain cases which fall within the terms of the Rule, as laid down by the counsel in *Shelley's Case*, and have usually been treated as exceptions thereto, but which, as appears from the *Provost of Beverly's Case*, do not, in reality, come within the scope or meaning thereof.

[209]

The Rule, when expressed according to this design, may be thus stated: When a person, by any deed or will, takes a freehold interest, and, by the same deed or will, a remainder of the same quality, as legal or equitable, is afterwards limited, whether mediately or immediately, to his heirs or the heirs of his body, * by that description, and in that character,^(e) or to his heir or the heir of his body, in the

(c) Co. Litt. 319 b.

(d) Co. Litt. 376 b.

(e) See Fearn, 188, 194, 195, 197—199.

singular number, but as a *nomen collectivum* in the sense of heirs or heirs of the body; the inheritance, in fee, or in tail, is executed or attaches originally in the person to whom the freehold is limited, as if it had been limited to him and his heirs general or special, instead of attaching originally in the individual first answering the description of his heir general or special.

401a It will be observed, that 'limitations of subsequent interests which are not by way of remainder, such as conditional limitations, are not within the Rule. (f) The Rule arose before such limitations were allowed; and when they were introduced by way of use and devise, the Rule was not held to apply to them, either directly or by analogy, because they were not within the reasons of the Rule.

Limitations not by way of remainder are not within the rule. See § 148-9, 149a, 117, 127a, 419-450.

SECTION THE SECOND.

The Terms and the Operation of the Rule explained.

402 APART from the operation of the Rule, the word heir or heirs may be either a word of purchase or a word of limitation.

403 Words of purchase are those which designate the first purchaser or person who is to take, and

404 which cause an interest to attach in him originally.

Words of limitation are words which serve to mark out the limits or quantity of an estate, and its course of devolution, and under which, in the case of an estate in fee or in tail, the heirs do not take originally, but derivatively by descent from their ancestor. (a)

405 The invariable, proximate, and proper operation of the Rule, is, merely to execute the subsequent interest in the ancestor himself, just as if, in addition to a prior limitation of a freehold to him, there were a

406 subsequent limitation to him and his heirs general or special. But, besides this operation, it has also an occasional, mediate, and indirect effect upon the prior estate limited to the ancestor, by creating, in certain cases, such a connexion between the two interests, as to let in the application of the doctrine of merger, and thereby occasion the annihilation of the prior estate of freehold.

407 Under the Rule in *Shelley's Case*, and the doctrine of merger, the subsequent interest is executed in the ancestor in five ways: I. In possession, absolutely. II. In interest. III. In possession, subject to the liability of afterwards becoming only executed or vested in interest.

Word heir or heirs, a word either of purchase or of limitation. Definition of words of purchase. Definition of words of limitation. [210] See § 26-42. The invariable, proximate, and proper operation of the rule. The occasional, mediate, and indirect effect thereof. Different modes in which the subsequent interest is executed in the ancestor.

(f) Fearn, 276.
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(a) See Fearn, 79.

IV. In possession, to some purposes only. V. As a contingent remainder.

I. In possession, absolutely. I. ^aIf the subsequent limitation of the inheritance follows immediately after the limitation of the freehold to the ancestor, ^(b) the freehold merges in the inheritance, and ^athe ancestor becomes seised of an estate of inheritance in possession. ^(b) The inheritance is then absolutely executed in possession in the ancestor. 408

II. In interest. II. ^aIf there is any interest intervening between the ancestor's freehold and the inheritance limited to his heirs general or special, ^(c) and such interest is vested, the freehold cannot merge, but ^athe ancestor is seised of an estate of freehold in possession, and of an estate of inheritance in remainder. ^(c) The inheritance is then executed in interest only, in the ancestor. 409

III. In possession, subject to the liability of afterwards becoming only executed in interest. III. The inheritance may be executed or vested in possession, subject to the liability of afterwards becoming only executed in interest. For, ^aif there are interests intervening, but they are only contingent, the freehold and the inheritance are united and executed in possession in the ancestor, only until such intervening interests become vested; and then open and separate, in order to admit such intervening interests as they arise. ^(e) 410

IV. In possession to some purposes only. IV. If land is limited to two persons for their lives, and, after their decease, to the heirs of one of them, or to husband and wife, and the heirs of the body of the husband; the estates in tail or in fee are executed in possession to some purposes only. For, they are not grantable away from or without the freehold, by way of remainder; and yet they are not so executed in possession as to sever the jointure, or entitle the wife of the person so taking the inheritance, to dower: and, in the above case of a limitation to husband and wife and the heirs of the body of the husband, ^frecovery against him, with single voucher, will not bar the issue or remainder; though his estate has been held to be so executed in possession, that his feoffment was a discontinuance. ^(f) 411

And ^aso where land is limited to two persons of the same sex, or to two of different sexes who may not lawfully intermarry, and the heirs of their two bodies; the inheritance is executed in possession *sub modo*: ^(g) and ^awhere the limitation is to the heirs of their two bodies, they take several inheritances; because they cannot have issue between them. ^(h) 412

Cases to be distinguished from these. There are certain other cases of joint-tenancy, which must be distinguished from these; namely, 413

^(b) Fearn, 28, 33.

^(f) *Ib.* 36.

^(c) *Ib.* 28, 32, 33.

^(g) *Ib.* 36.

^(e) *Ib.* 37.

^(h) *Ib.*

¹ where there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance to them in fee simple; or where the freehold is limited to baron and feme jointly, and a remainder is limited to the heirs of their bodies; the inheritance is then executed jointly in possession.⁽ⁱ⁾ And ²so where the freehold is limited to two persons jointly, who may by common possibility lawfully intermarry, and who may therefore have a common heir between them, and a remainder is limited to the heirs of their bodies.^(k)

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415 But, ¹ where the limitation of the freehold is not joint, but successive; as to one for life, remainder to the other for life, remainder to the heirs of their bodies; there, it seems, the ultimate remainder is not executed in possession, but they take a joint remainder in tail.^(l)

416 And ²if land is limited to one parent for life, remainder to the heirs of the body of baron and feme; this is no remainder in the tenant for life; because the freehold is limited to one parent alone, and the person who is to take in remainder, must be heir of both their bodies.^(m)

417 And ³a limitation to a woman and the heirs of her late husband, on her body begotten, was adjudged to give her no more than an estate for life.⁽ⁿ⁾

418 V. ° If the subsequent limitation, instead of being V. As a contingent remainder, is expressly limited upon a contingency; still, it will not be a contingent remainder to the heir general or special as a purchaser, but will attach originally in the ancestor, as a contingent remainder; so that his heir can only take by descent. And if the contingency happens in the lifetime of the ancestor, the inheritance will then vest in him either in possession or in interest, according to the first two rules.^(o)

SECTION THE THIRD.

The Grounds of the Rule explained.

THE reasons of the rule would appear to be these:—

419 I. The prevention of fraud upon feudal tenure. [213]
For, ¹when the heir came in by descent, and was I. Prevention under age, the lord was entitled to the grand fruits of mili- of fraud upon

(i) Fearn, 36—7.

(k) *Ib.* 35.(l) *Ib.* 36.

(m) Fearn, 38, 65; and *Gossage v. Taylor*, Stiles Rep. 325; *Lane v. Pannet*, 1 Roll. Rep. 230, 317, 436; and *Frognorton v. Wharrey*, 3 Wils. 125, 144; as there stated.

(n) *Mandeville's Case*, Co. Litt. 26 b; as stated, Fearn, 40.

(o) Fearn, 30, 32, 34.

feudal
tenure.

tary tenure, wardship and marriage; but if the heir took by purchase, then the lord could only claim the trifling acknowledgment of a relief.(a)

II. Prevention of fraud upon the specialty creditors of the ancestor.

II. ^bThe prevention of fraud upon the specialty creditors of the ancestor, who, as Mr. Justice Blackstone and Mr. Hargrave have observed, would have been defrauded, if the heirs had been allowed to take by purchase; as the land would not have been assets in their hands.(b) It is true that ^cthis reason fails as to limitations to heirs special; since estates tail were not subject to debt.(c) But it might nevertheless be a sufficient reason for the rule as regards limitations to heirs general.

III. Desire of facilitating alienation.

III. But, whatever have been the grounds of the rule in its origin, another reason subsequently existed, as an inducement to the preservation of the rule from legislative abolition and judicial discouragement, after the feudal reason had ceased with the feudal system itself; and that subsequent reason, is, ^dthe desire to facilitate alienation, by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease.(d)

IV. These reasons involve another;

IV. But these reasons, which would serve by themselves, to stamp the Rule with the character of a mere prohibitory Rule, founded in policy, do, in fact, when closely considered, involve other reasons, which impart a different and mixed character to the Rule; enabling us to regard it as a Rule of Construction, as well as a Rule of Policy; and furnishing us with the means of gaining more definite and satisfactory notions of its nature, extent, and application.

Why should such a mode of limiting an estate have been treated as a fraud? and why should the Rule be said to have been adopted for the prevention of fraud? Does not this very expression indicate, that the limitations in question would, generally and in the main, have virtually and essentially accomplished the same purpose as a limitation to the ancestor and his heirs, or the heirs of his body, except as regards the rights of certain third persons, who were defrauded by a variation in the mode of constructing such limitations? If such limitations were essentially different from a gift of the inheritance to the ancestor, there would have been nothing which could, in any point of view, or with any sort of propriety, be termed a fraud.

It is allowed, on all hands, that if the parties chose to give the heirs an estate by purchase, they could do so, by taking care not to give the ancestor an estate of freshhold. There

(a) Harg. Tracts, 566.

(b) Harg. Tracts, 501, 566.

(c) Fearn, 87.

(d) See Harg. Tracts, 496, 500.

was no rule, in such a case as this, to vest the inheritance in the ancestor himself, so as to preserve the rights of the lord, or the rights of the creditors of the ancestor. Why then should the heirs have been prevented from taking by purchase, where the ancestor took an estate of freehold? Why would this be a fraud, in the latter case, more than in the former?

To account for this diversity; to account for the interposition of a Rule of Policy, prohibiting the heirs from taking as purchasers, in one case, while no such Rule was interposed in other cases equally falling within the same policy; we are driven to the necessity of seeking some reason from

the nature of the limitations themselves. And one such reason has been intimated above; namely, that in the cases falling within the Rule, the two limitations would be to the ancestor and to his heirs or the heirs of his body, would, generally and in the main, have virtually accomplished the same purposes as a gift of the inheritance, in fee or in tail, to the ancestor himself; and therefore, the law construed those limitations to amount to such a gift, in order to prevent the injury which the lord and the specialty creditors would have sustained, if parties had been allowed, generally and in the main, virtually to create an estate, of the same quantity, and the same alienable and transmissible quality, as one limited to the ancestor himself; and yet, by a particular mode of limitation, fraudulently to evade the claims of the lord and the specialty creditors of the ancestor.

424 "If such a limitation," observes Fearn, (e) "had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit, if occasion had called for it; if not, he might have let it remain to his heir, in as beneficial a manner as if it had descended to him; at the same time that the lord would have been deprived of those fruits of the tenure which would have accrued to him upon a descent." [215] Illustration of this.

425 It is true that the Rule extends even to cases, where the freehold is so limited that it may determine in the ancestor's lifetime; as where an estate is limited to the ancestor for another's life. It is true, also, that where the inheritance was limited to his heirs general, different persons might sometimes have inherited as heirs to the person first taking as heir, from those who would inherit as heirs to the ancestor himself. But surely it would be a sufficient reason for one uniform Rule, that limitations to the ancestor and his heirs general or special, would, as already

(e) pp. 83, 84.

observed, generally and in the main, have virtually accomplished the same purposes as a gift to the ancestor himself. In fact, if one uniform Rule had not been laid down, it would only have been opening a door to fresh schemes of fraudulent evasion.

Answer to another objection drawn from the case of a fictitious descent, *per formam doni*.

‘Where, indeed, there is a limitation to the heirs special, but the ancestor himself takes no estate of freehold, as in *Mandevile’s Case*, 1 Inst. 26 b, the heirs special take in the same manner as if they had been in under a limitation to the ancestor himself. But this is a fictitious “descent *per formam doni* under the statute of entails.” (f) And if the ancestor were living, and such a gift had been construed to be a gift to the ancestor himself under the Rule, the ancestor would take an estate in the land, and would have had the power of disposing of the estate, though the donor had plainly excluded him from both. And hence it is obvious why the Rule was not applied to cases of this kind; and it is evident that such cases have no effect in impeaching the reasons above given for the adoption of the Rule, as it applies to other cases.

[216]

It may, at first sight indeed, be thought that the latter reason just assigned for the non-application of the Rule to such cases as *Mandevile’s*, would equally serve to show that the Rule ought not to have been adopted at all in regard to any other cases; as the effect of it is to give the ancestor the power of disposing of the inheritance. But it must be observed, that, in those cases, as mere tenant for life, independent of the Rule, he might have destroyed the contingent remainder to his heirs, unless protected by a limitation to a trustee to preserve.

See § 770, 776-B.

Fearne’s answer to the objection; that the Rule frustrates the testator’s intention.

Again, the testator’s “meaning (as Fearne observes, with his usual acumen, cogency, and felicity of expression,) would be as substantially violated, by investing the first fortuitous heir with the power of defeating the succession to the whole sequel train, as by investing the ancestor himself with such power; except that the first heir himself would, in the latter case, be equally subjected to it with all the rest. And why not, if the testator has not distinguished that first from the rest, nor of consequence preferred him to the ancestor? The law imposes the dilemma of committing such power either to the ancestor or his next heir: will any reasonable inference of the testator’s intention in the matter induce the preference of an unknown derivative character, accidentally meeting the terms of a general description, to the original attractive object, the groundwork of the testator’s bounty, and to which the attendant relative designations seem mere appendages?” (g)

(f) Prest. View of Rule, 25. Upon this point see also Fearne, 80—82.
(g) Fearne, 201.

429 V. Another reason, also founded in the nature of the limitations themselves, remains to be adduced. In cases that fall within this Rule, and in certain other cases noticed in the following Chapters, there are two existing yet inconsistent intents; the one of which may be termed the primary or paramount intent, and the other, the secondary or minor intent. And, as these, by reason of their inconsistency, cannot be both effectuated, the secondary or minor intent is sacrificed, in order to give effect to the primary or paramount intent.

430 The primary or paramount intent, in cases falling within the Rule, is, that the ancestor should have the enjoyment of the estate for his life; and subject thereto, that the estate should descend to all the heirs general or special of the ancestor, and to none but those who are heirs of the ancestor.

431 The secondary or minor intent is, to accomplish the primary or paramount intent in a particular mode; in such a mode, as the grantor or deviser imagines, as to secure that primary or paramount intent from being defeated by the act of the ancestor; in other words, the secondary or minor intent is, that the ancestor should have a life estate only, and that the heirs should take by purchase.

432 The primary or paramount intent above mentioned is imported, *ex vi termini*, by the word "heirs," taken in connexion with the limitation of a preceding freehold to the ancestor. For, it is evident that the ancestor was the sole ascertained and original attracting object, the groundwork of the grantor's or testator's bounty; and the heirs general or special being all, as such, equally unascertained, have all, *prima facie*, an equal claim on the grantor's or testator's regard, grounded entirely on their common relationship to the ancestor. Unless, therefore, we have some apparent ground for presuming a distinction and a preference between the person first happening to answer the general description, and any others who may afterwards come under the same description; it is only fair to suppose that the testator meant the persons who should take after the ancestor, should be any persons indiscriminately who should answer the description of heir general or special of the ancestor, and be entitled only in respect of such description; and that the succession should not be confined to the person so first claiming, and his representatives, as such, but that it should go equally to all other persons successively answering the same description of heirs general or special of the ancestor, and vest in them in that character only. (A)

(A) See Fearn, 200.

Necessary to [218] reject the secondary or minor intent in order to effectuate the primary or paramount intent. Now, admitting it to be clearly, and, in fact, necessarily inferrible in this way, that it was the intent, that the ancestor should be succeeded by any person claiming simply in the character of heir general or special; and that all other persons to whom the same character of heir general or special of the ancestor should belong, should, simply by virtue of their sustaining that character, equally be entitled to succeed to the estate; in other words, and more briefly, if the estate is to go to any and every person who can claim as heir general or special to the ancestor, and every such person is to take simply in that character; then, in order to effectuate this intent, and secure the succession to its intended objects, it is necessary to reject, as inconsistent and incompatible, any other intent that the ancestor should take an estate for life only, and the heirs should take by purchase. 433

both in the case of limitations to heirs general. This is perfectly clear as regards limitations of an estate to the heirs general. For, "if it vests in the first heir general by purchase, it cannot go in succession to succeeding heirs of the same ancestor, not being heirs general of such first heir, but may eventually go to strangers, either in defect or exclusion of heirs of such ancestor. For, if such ancestor be the father, or *ex parte paternâ*, of the heir so taking by purchase, and such heir should leave no heirs *ex parte paternâ*; the succession will be to his heirs *ex parte maternâ*. And if such ancestor should be the mother, or *ex parte maternâ*, of the heir so taking by purchase; the succession will be to his heirs *ex parte paternâ*, in preference of his heirs *ex parte* his said ancestor." (i) Whereas, if the ancestor is the first purchaser of the inheritance, so that, on his death, it vests in the first heir by descent, it goes to those heirs only of the first heir, who would also be heirs of the ancestor, the first purchaser and the primary object of the grantor's or testator's choice or bounty. 434

and in the case of limitations to heirs special. [219] And the same is the case with limitations to heirs special. For, in order to secure the succession to all the heirs special of the ancestor, and not merely to those who shall likewise be heirs special of the first heir special, an intent that the ancestor should take a life estate only, and that the heirs special should take by purchase, must be rejected, as inconsistent and incompatible. 435

Answer to objection drawn from the case of a fictitious descent *per formam doni*. Where, indeed, the ancestor takes no preceding estate of freehold, a limitation to the heirs special, though vesting in the first heir special by purchase, will nevertheless secure the succession to all the heirs special of the ancestor, in the same manner as if the inheritance had vested in the ancestor himself. But this, as we have seen, 435a

(i) Fearn, 192.

is a fictitious descent, *per formam doni*, under the statute See § 426. of entails; in a case in which, from the non-existence of any estate in the ancestor under the terms of the grant or devise, so far from there being any pretext for construing the estate limited to the heirs special to vest in the ancestor, such a construction would be admitting the ancestor to an estate in and a power over the land, though the grantor or deviser himself had excluded him entirely. In this case, therefore, it is fairly allowable to resort to the fiction of a supposed descent, in order to carry the estate to all the heirs special of the ancestor, without vesting the inheritance in the ancestor. Hence it is evident, that this case does not invalidate the general argument, that where the ancestor takes a preceding estate of freehold, it was necessary to vest the inheritance in the ancestor, in order to carry the estate to all his heirs special. For it is not to be imagined that the law would resort to the fiction of a supposed descent, in order to effectuate the intent above-mentioned, when, generally speaking, there is virtually and in the main, a real and perfect descent; the interests of the ancestor and his heirs special jointly possessing the distinctive essential qualities of an estate tail in the ancestor, as regards the number and character of the individuals who are to take by virtue thereof.

436 And as the mode of succession may well be regarded as subordinate to the succession itself, and the prescribing a certain mode of succession, a secondary or minor consideration in comparison with the admission to such succession of all who have a common claim upon the same; it is strictly accurate and definite to say, in regard to the operation and the reason of the Rule, that the secondary or minor intent is sacrificed for the purpose of effectuating the primary or paramount intent. It is accurate and definite to say that the secondary or minor intent is sacrificed to effectuate the primary or paramount intent. [220]

437. It is true, indeed, that in the great case of *Jesson v. Wright*, Lord Redesdale said, "that the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise."^(k) Observations of Lord Redesdale,

438 And in *Doe d. Gallini v. Gallini*, Lord Denman and Lord man, C. J., said, "The doctrine that the general intent must overrule the particular intent, is incorrect and vague. The more correct mode of stating the rule of construction, is, that technical words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are

(*) 2 Bligh, 56.

of such a nature as to make it perfectly clear that the testator did not mean to use them in their technical sense."^(l)

They are just, but are not explanatory of the grounds of the Rule. These observations of Lord Redesdale and Lord Denman are perfectly just; and they accurately point out the construction involved in the Rule. But they do not furnish, and probably were not intended to furnish, a satisfactory explanation of the grounds of the Rule. 439

Why the technical words over-rule the other words. Why have the technical words the effect of overruling other words, which, though not technical, have a known legal import as much as the technical words themselves? "The intention, expressed or necessarily implied, so far as the same is consistent with the rules of law, is the controlling rule of construction in wills, and with scarcely any exception, in deeds also."^(m) The fact seems to be, that the technical word "heirs" has this effect, because (in addition to the other grounds of the Rule above-mentioned) it expresses the primary or paramount intent; whereas the other words only express a secondary or minor intent; and that the incorrectness and vagueness of the common statement of the principle of the Rule does not lie in the ascription of two different intents, the one of which is made to give way to the other; but that such statement is incorrect and vague merely by reason of the adjectives employed, "general" and "particular," and from the omission of the essential circumstance of the one intent being inconsistent and incompatible with the other. This, it is humbly submitted, is sufficiently clear from what has been said in the preceeding pages: and it is fully borne out by the words of Lord Eldon, C., who, in moving judgment in the House of Lords in the very case of *Jesson v. Wright*, said, "It is DEFINITELY SETTLED AS A RULE OF LAW, that where there is a particular and a general or paramount intent, the latter shall prevail."⁽ⁿ⁾ 440

Wherein consists the incorrectness and vagueness of the common statement of the Rule. [221] Observation of Lord Eldon on the general and particular intent. Observation of Butler on the general and particular intent. 441

Observation of Lord Eldon on the general and particular intent. Observation of Butler on the general and particular intent. 442

(l) 5 Bar. & Adol. 640.

(m) Upon this point See Butler's Note, Co. Litt. 271 b, VII. 2, beginning of third paragraph. And Fearn, 186.

(n) 2 Eligh, 51.

effect, will sacrifice to it a particular intention inconsistent with it.”(o)

446 Hargrave has justly observed, “that the Rule cannot be treated as a medium for discovering the testator’s intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that when it is once settled that the donor or testator has used words of inheritance, according to their legal import; has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus, by reference to whom the succession is to be regulated; then the Rule applies.”(p) But, the Rule is a means for effectuating the testator’s primary and paramount intention, when previously discovered by the ordinary rules of interpretation; a means of accomplishing that intention to comprise by the use of the word heirs, the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated. And the way in which the Rule operates, as a means of doing this, is, by construing the word heirs as a word of limitation; or, in other words, by construing the limitation to the heirs general or special, as if it were a limitation to the ancestor himself and his heirs general or special.

447 The same learned author, however, has described the Rule as “paramount to and independent of private intention.”(q) And it has been said, indeed, by a very eminent lawyer, that “instead of seeking the intention of the parties, and aiming at its accomplishment, it interferes, in some at least, if not in all cases, with the presumable, and, in many instances, the express intention. In its very object it was levelled against the views of the parties.”(r) The same position has also been advanced and elaborately and ably maintained by other writers, who have subsequently treated of the subject.(s) And it would seem scarcely possible, indeed, for any one to review the cases, without perceiving that such was the very object of the Rule; that “it was levelled against the intention.”

448 But, at the same time, from a careful examination of the judgments delivered upon those cases; against the consideration of the views of the profound Fearne, by whom, as Butler remarks, the Rule has been “discussed with infinite learning and ability;” and also, it is humbly submitted, from the attempt which has just been made in

449

The Rule is not a medium for discovering the intention. But it is a means for effectuating the primary or paramount intention, when discovered.

The Rule is indeed levelled against the intent,

secondary or minor intent.

only

But only

(o) Co. Litt. 271 b, note (1), VII. 2.

(q) Co. Litt. 376 b, note (1), II.

(s) See Hayes’s Inquiry, and Hayes’s Principles, *passim*; Jarman’s Powell on Devises, 301, note (5); Phillips’s Inquiry, 18.

(p) Co. Litt. 376 b, note (1), II.

(r) Prest. View of Rule, 12.

the preceding pages to give a more definite, guarded, and accurate statement of the grounds of the Rule; it is perfectly clear that the intention against which the Rule is so levelled, is a mere secondary intent.

Summary of the grounds of the Rule: In fine, to sum up the principles or grounds of the Rule, in a few words, it would seem clear that it was designed to effectuate the primary or paramount (or, as it is commonly but vaguely termed, the general) intent, at the expense, and in defeasance of a secondary or minor (or, as it is commonly but vaguely termed, particular) intent, amounting, in its nature, to an intent to accomplish a mere fraudulent evasion of the incidents to a descent, and, as such, prejudicial, in its object or tendency, to the lord and the specialty creditors of the ancestor; an intent, too, which was opposed to the policy of the commercial times which quickly followed, and was also incompatible with that primary or paramount intent, of which a definition and explanation has already been given.

SECTION THE FOURTH.

The Application and Non-application of the Rule, in Cases of Legal Estates and Trusts Executed.

Preliminary caution. If we do but carefully bear in mind the terms of the Rule, as expressed by the counsel in *Shelley's Case*, and as indicated in the *Provost of Beverly's Case*, and keep steadily in view the principles or grounds thereof above mentioned, we shall perceive that the numerous decisions upon the Rule, with scarcely a single exception, are all consistent with each other; and we shall find little or no difficulty in solving any other cases that may arise. Whereas if we abandon or misapprehend the principle, as stated and explained above, that in the cases under the rule, there is a primary or paramount intent, and a secondary or minor and incompatible intent, the latter of which is to give way to the former; or if we mistake the true import of those terms; we shall abandon all hope of untying the knots in the subject, and be driven to cut them in such a way as to disaffirm the authority of numerous decisions, which never have, and never ought to be, overruled; and even to deny that "the controlling rule of construction in wills, is, the intention expressed or clearly implied;" to contradict which, Fearne observes, "would be a mockery, a denial of the import of the word will."^(a) Or, as the only alternative, we shall be plunged into inconsistency and uncertainty, and shall then, but then only, have abundant cause to say, with a learned author, "it is much

(a) Fearne, 186.

and seriously to be lamented, that a line cannot be drawn so nicely, as to enable a distinction to be clearly taken, discriminating those cases that are, and those that are not, the objects of the Rule."

452 On attending carefully to the principles above Three general propositions may be laid down for the guidance of the practitioner in deciding cases as to the application of the Rule in *Shelley's Case*. laid down.

PROPOSITION I.

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| 453 | No circumstances, however strongly and conclusively indicative merely of an intent that the ancestor should take a life estate only, and that his heirs general or special should take by purchase, will be sufficient to prevent the operation of the Rule; nor, indeed, will the most positive direction to that effect be sufficient for the accomplishment of such a purpose: because, such circumstances or directions only serve to make the secondary intentions more clear, without negating the existence of, or in any way affecting, the primary intent. Hence the Rule applies, | I. First general proposition, showing where the Rule applies, notwithstanding apparent indications to the contrary. See § 429-450. |
| 454 | 1. "Though the property is limited to the ancestor for life only, or for life, and no longer.(a) | 1. Limitation for life only. |
| 455 | 2. Though limited to him without impeachment of waste.(b) | 2. Or without impeachment of waste. |
| 456 | 3. Though there is a power given him, to do that, which, as tenant in tail, he might do without any such power; as to make a jointure, or leases.(c) | 3. Power to make a jointure or leases. |
| 457 | 4. Though his estate is subjected to the obligation of keeping the buildings in repair.†(d) | 4. Obligation to repair. |
| 458 | 5. "Though there is a direction that he shall not sell or dispose of the estate, for any longer time than his life.(d) | [. 225] 5. Restraint of alienation. |
| 459 | 6. "Though there is a limitation to trustees to preserve contingent remainders; and there is no | 6. Limitation to trustees to preserve contingent remainders. |

(a) *Thong v. Bedford*, 1 Bro. C. C. 313; as stated, Fearn, 177.

(b) *Jones v. Morgan*, 1 Bro. C. C. 276; as stated Fearn, 134. *Bennett v. Earl of Tankerville*, stated § 475.

(c) *Bale v. Coleman*, 2 Vern. 670; 1 P. W. 142; as stated, Fearn, 124. *Jones v. Morgan*, 1 Bro. C. C. 276; as stated, Fearn, 234. *Broughton v. Langley*, 2 Ld. Raym. 873; as stated, Fearn, 159.

(d)† *Jesson v. Wright*, stated § 475.

(d) *Perrin v. Blake*, 1 Black. Rep. 672; and *Hayes d. Foorde v. Foorde*, 2 Black. Rep. 698; as stated, Fearn, 156, 173.

contingent remainder, unless the limitation to the heirs is one. (e)

7. Limitation to heirs for their lives. 7. 'Though the heirs are to take for their lives. (f) (See § 486.) 460

8. Concurrency of several of these indications. 8. And the Rule will be applied even where several of these indications occur in the same case. 461

A testator devised to his wife, for life; remainder to trustees, &c., remainder to his daughter, for life; remainder to trustees, &c.; and, from and immediately after the decease of his daughter, he devised to the heirs of her body; and, for want of such issue, then, to *W. T.* and his heirs; it being his will and meaning, that after the decease of his wife, his daughter should have only an estate for life; and that after the decease of his wife and daughter, the premises should go to and vest in the heirs of the body of his daughter; and that for want or in default of such issue, the same should vest in *W. T.* and his heirs; and that his daughter should not have any power to defeat his intent and meaning in this respect. It was held, that the daughter took an estate tail.

Reece v. Steel, 2 Sim. 233. And where a testator devised to *C. H.* all his real estate, during the term of her natural life, and to her heirs, the issue of her body, for ever, during the term of their natural lives. If his niece had no son, then, to her eldest daughter. Each heir was only to be tenant for their respective natural lives, during the term of 99 years from the testator's decease; divesting all from power to sell. No timber was to be cut down, except for repairs. A proviso was added, that if his niece left no issue, or should they become extinct, all his real estate should go over. The Vice-Chancellor held that *C. H.* took an estate tail.

See also *Jones v. Morgan*, 1 B. C. C. 276; *Perrin v. Blake*, 1 Bl. R. 672; and *Hayes v. Foorde*, 2 Bl. R. 698; as stated, *Fearne*, 184, 156, 173.

9. Freehold determinable in the ancestor's lifetime. 9. It applies in the case of a freehold determinable in the ancestor's lifetime. 462

Lands were limited to *E. B.*, for life, if she continued sole and unmarried, with an ultimate limitation to the heirs of her body. And Sir *W. Grant*, M. R., held, that there was a vested estate tail, instead of a contingent remainder, notwithstanding the possibility that the first estate might terminate in the life of the widow, and before there could be an heir of her body.

See also *Curtis v. Price*, 12 Ves. 89. *Fearne* 30, 31-33.

(e) *Wright v. Pearson*, as stated, *Fearne*, 126, &c. *Coulson v. Coulson*, 2 Stra. 1125; as stated, *Fearne* 161. *Hodgson v. Ambrose*, Doug. Rep. 337; as stated, *Fearne*, 174.

(f) *Hayes v. Foorde*, 2 Bl. R. 698; as stated, *Fearne*, 173.

463 10. It applies where the freehold is by implication. (f) 10. Freehold by implication.

464 11. It also applies where the ancestor takes no express estate, nor any estate by implication, but an interest is limited to his heirs special, in cases where he is the grantor, and that interest is preceded by estates for life or in tail, which of course may regularly expire in the lifetime of the grantor, by their original limitation, (g) and not merely by surrender or forfeiture. (h) 11. Freehold by resulting use, where a remainder is limited to the heirs special of the grantor, See §. 59, 61, 467.

465 In this case, inasmuch as the interest limited to the heirs special of the grantor, cannot vest till his death, and the preceding interest may regularly expire before his death, nay the very instant after the delivery of the deed creating them; there is a freehold use remaining undisposed of in the grantor, sufficient to attract the operation of the Rule.

And this is the case even where there is an ulterior vested interest. For, it is evidently the intention that such ulterior vested remainder should only occupy, or absorb, as it were, that portion of the seisin, property, or ownership, subsequent to the death of the grantor: and even then, that it should so occupy or absorb it, subject to open and let in the preceding estate, in favour of the heirs special of the grantor, in case there should be any at the death of the grantor: because, of course there is no probability that the grantor intended that his heirs special should be excluded, merely in consequence of the preceding estates happening to expire before his death. And, in the case supposed, where the heirs special are the heirs special of the grantor; there is no good reason why this exclusion should not be prevented, or why the intention that the ulterior vested remainder should not occupy or absorb any portion of the seisin, property, or ownership, anterior to the death of the grantor, should not be effectuated, when all that is necessary for the purpose, is, to regard the intervening portion of the use, between the expiration of the preceding estates and the death of the grantor, as undisposed of, and still remaining in the grantor.

466 Where indeed the limitation is to the heirs special, not of the grantor, but of a third person, then the exclusion of the heirs special, in the event of the expiration of the preceding estates, cannot be prevented; and the heirs special

(f) Fearn, 41.

(g) *Wills v. Palmer*, 5 Burr. 2615; 2 Black Rep. 687; as stated, Fearn, 45; overruling *Southcot v. Stowell*, 1 Mod. 226, 237; 2 Mod. 207, 211; as stated, Fearn, 44.

(h) See *Tippin v. Cosin*, Carth. 272; 4 Mod. 380; as stated, Fearn, 43—4.

of a third person.

ulterior vested remainder must occupy and absorb the seisin, property, or ownership, subsequent to the preceding estates; as well that part which is anterior to the death of the ancestor, to whose heirs special the intermediate limitation is made, as that part which is subsequent to his death, subject to open and let in the remainder to such heirs special. For, there is no room for the construction adopted in the other case; and even if an estate could be raised by implication in a deed, there is no implication that the ancestor was intended to take an estate of freehold, although, indeed, there is no probability that the limitation to his heirs special was intended to fail, merely in consequence of the preceding estates expiring before his death.

12. Freehold 12. The Rule also applies where the ancestor 467
by resulting takes no express estate, nor any estate by implication, where a tion, but a limitation is made to his heirs special, in cases [228] where he is the grantor, ^aunprecedented by any other limitations,^(h) or ⁱby none but limitations of chattel interests.⁽ⁱ⁾ In these cases, the entire fee simple remains in the grantor, whether there are any ulterior limitations or not; because even if there are any ulterior interests, none of them can be vested. And as, therefore, the grantor has virtually a particular estate of freehold, the rule executes the interest limited to his heirs special in himself.

13. Where there are apparently two concurrent contingent remainders. 13. The Rule applies even where it might appear 468
that the limitation to the heirs of the body of the ancestor, and the limitation over, were intended to be two concurrent contingent remainders, the latter to take effect as an alternative limitation, in case there should be no heir of the body, at the decease of the ancestor.

Doe d. Cole v. Goldsmith, 7 Taunt. 209. A testator devised to *F. G.* all his lands, to hold to him and his assigns, for life; and, immediately after his decease, he devised the same unto the heirs of his body lawfully to be begotten, in such parts, shares, &c., as *F. G.* should appoint; and, in default of such heirs of his body lawfully to be begotten, then, immediately after his decease, over to *F. G.* It was held that *F. G.* took an estate tail by implication.

14. Where ancestor's estate is not for his own benefit. 14. ^kWhere it is limited to the ancestor in trust 469
for another, or to answer some particular purpose, and not for his own benefit, Fearnie considers that the case does not fall within the Rule. Butler, however, remarks that Courts of Law must treat the case as falling within the

(h) *Pibus v. Mitford*, 1 Ventr. 372; as stated, Fearnie, 41, 42.

(i) *Penkay v. Hurrell*, 2 Vern. 370; as stated, Fearnie, 25. See also Butler's note, Fearnie, 41, (y), in opposition to *Adams v. Savage*, 2 Salk. 679, and to *Rawley v. Holland*, Vin. V. 22, p. 189, pl. 11; as stated, Fearnie, 42, 43.

Rule; because they cannot take notice of any trust charged on legal estate. (k)

470 15. It may here be added, that, the Rule is applied in equity where both estates are equitable, (l) [229] even though the first be for the separate use of a feme covert. (m) But it does not apply where the first estate is legal, and the other equitable; (n) or *vice versa*. (o) [229] both estates are equitable, and the first is for separate use of feme covert.

471 16. The Rule is equally applicable, whether the hereditaments are of freehold or of copyhold tenure. (p.)

471a 17. The Rule applies where the limitation to the heirs of the ancestor, is an ulterior limitation to his right heirs male, after an intermediate limitation to his first and other sons. [230] Where a limitation to right heirs male follows

A testator devised to P., for life; remainder to trustees to preserve &c.; remainder to the first and other sons of P., Duke of A., with remainder to the right heirs male of P. It was held that P. took an estate in tail male in remainder; Bayley, J., observing, that such remainder was not necessarily inoperative: for, cases might be put, where persons would have taken as "heirs male" of the body of the Duke, and yet would not have taken under the limitation to his first and other sons in tail male; as, if the Duke had had an eldest son, who died in the lifetime of the testator, leaving a son. *Doe d. Earl of Lindsey v. Colyear*, 11 East, 548.

471b 18. Even where a testator devises to his wife, for life; remainder to the heirs of her body by him; and she never has any issue by him; the Rule will be applied by considering her to be tenant in tail after possibility of issue extinct, in respect of the possibility she had of issue during nine months from the testator's decease. [230]

A testator devised a reversionary estate to his wife (who never had issue by him,) for the term of her life; and from

(k) Fearn, 35, and note (p).

(l) Fearn, 59. *Garth v. Baldwin*, 2 Ves. Sen. 646; as stated, Fearn, 125, 126. *Wright v. Pearson*, as stated, Fearn, 126, &c. *Brydges v. Brydges*, 3 Ves. Jun. 120; as stated, Butl. note (g), Fearn, 201; overruling *Bagshaw v. Spencer*, Ves. Sen. 142; as stated, Fearn, 121, &c.

(m) Fearn, 56; and *Pitt v. Jackson*, 2 Brown's Rep. Chanc. 51; as stated, Fearn, 57.

(n) *Tippin v. Cosin*, Carth. 272; 4 Mod. 380; as stated, Fearn, 43, 52. *Shapland v. Smith*, 1 Brown's Rep. Chanc. 75; and *Silvester v. Wilson*, 2 D. & E. 444; as stated, Fearn, 57, 58.

(o) Fearn, 58, 59; and *Venables v. Morris*, 7 D. & E. 342, 438; as stated, Fearn, 59, note (d).

(p) Fearn, 60—71.

Mau. & Sel. 65. and after her decease, to the heirs of her body by him; and for want of such issue, to his brother-in-law. It was held, that the wife was tenant in tail after possibility of issue extinct, the words, and the possibility she had of issue during nine months from the testator's death, being sufficient to constitute her such.

II. Second general proposition, showing where the Rule applies. See § 429-450.

PROPOSITION-II.

Nor will the application of the Rule be excluded 472 by any words which do not unequivocally indicate, but are only capable of being regarded as indicating, the objects of succession to be individuals other than persons who are to take simply as heirs general or special. Hence,

1. Word heir, in the singular, with the word next, first, or eldest, but without superadded words of limitation. See § 485. 1. The Rule applies, 'though the word "heir" is used in the singular, (q) even 'with the restrictive word next, first, or eldest, prefixed to it, (r) unless there are superadded words of limitation; because "heir" is *nomen collectivum*, and equivalent to "heirs;" and the word first, next, or eldest heir, may mean the heir who from time to time shall answer that description, and not that person alone who shall first answer such description. 473

2. Words of limitation superadded [231] to the word heirs. See § 487. 2. It also applies, though in addition to the first words of inheritance, namely, heirs or heirs of the body, in the plural number, there are superadded words, provided they are 'similar to the first words, (s) or provided they 'may fairly be assimilated to the first words, merely by supplying, as an ellipsis, the words which are necessary for that purpose, or by understanding the one to be used in the same sense as the other; (t) and by rejecting the word assigns, if used, as mere surplusage. 474

Kinch v. Ward, 2 Sim. & Stu. 409. A testator gave freehold and leasehold estates to trustees and their heirs, upon trust to permit his son *T*. to take the rents and profits, for life; and from and after the decease of his son *T*., the testator gave such freehold and leasehold estates unto the heirs of the body of his son, lawfully begotten, their heirs, executors, administrators, and assigns, for ever; but in case his son *T*. should die without issue, then,

(q) *Blackburn v. Stables*, stated § 493; *Burley's Case*, 1 Vent. 230; *Whiting v. Wilkins*, 1 Bulstr. 219; *Richards v. Lady Bergavenny*, 2 Vern. 324; and *White v. Collins*, Com. Rep. 289; as stated, Fearn, 179.

(r) *Miller v. Seagrave*, Robinson's Gavelk. 96; and *Dubber d. Trollope v. Trollope*, Amb. 453; as stated, Fearn, 179.

(s) See *Douglas v. Congreve*, 1 Beav. 59; as stated, § 477.

(t) *Shelley's Case*, 1 Co. Rep. 93, as stated, Fearn, 181. *Wright v. Pearson*, as stated, Fearn, 126, &c. *Goodright v. Pullynn*, 2 Ld. Raym. 1487, as stated, Fearn, 160. *Morris v. Le Gay*, cited 2 Burr. 1102, as stated, Fearn, 161. *Hayes d. Foorde v. Foorde*, 2 Blac. Rep. 698, as stated, Fearn, 173.

he gave the said estates upon trust for the benefit of his son *W.*, and the heirs of his body, lawfully begotten, in like manner as he had devised the same for the benefit of his son *T.* and the heirs of his body. The question was, what estate *T.* took in the leaseholds. Sir John Leach, V. C., held, that the gift over was not, as in the case of *Hodgeson v. Bussey*, 2 Atk. 89, in default of such issue, but in default of issue generally; that the devise to the trustees to permit the son to take the rents and profits, clearly created a legal, and not a mere equitable estate; that the words of limitation annexed to the gift to the heirs of the body must be rejected, as well with respect to the freehold, as the leasehold estate; and that *T.* took an absolute interest in the leasehold property.

Again; a testator devised to *A.*, for life; and after her decease, to her son, *J. T.*, for life; and after the determination &c., to trustees, to preserve &c.; and, from and after the decease of *J. T.*, then, he devised to the heirs of the body of *J. T.*, his, her, and their heirs and assigns for ever; but, in case there should be a failure of issue of the body of *J. T.*, then over. The Court of King's Bench certified, that *J. T.* took an estate tail in remainder. *Measure v. Gee*, 5 Bar. & Ald. 910.

So where a testator devised lands, in trust for *F. W.*, till he should arrive at the age of 21, upon his legally taking and using the testator's surname; and then, upon his attaining such age, and taking that name, *habendum* to him, for life; and, from and after his decease, to hold to the trustees, and the survivor of them, and the heirs of such survivor, to preserve contingent remainders in trust for the heirs male of the body of *F. W.*, taking the testator's name, and the heirs and assigns of such male issue for ever; but, for want and in default of such male issue, then, upon similar trusts for *F. W.*'s brother and his issue. It was held that *F. W.* would take an estate tail on his coming of age, and taking the testator's surname. *Nash v. Coates*, 3 [232] Bar. & Adol. 839.

475 3. The Rule also applies, though words of distributive modification are superadded, provided there are no superadded words of limitation, and no other unequivocal indications that the word heirs is not used in the technical sense; because the grantor or testator might have erroneously supposed that the heirs might take in that character, and yet in a distributive mode; and therefore these words of modification are rejected as repugnant.

A testator devised to his daughter and the heirs of her body lawfully to be begotten, for ever, as tenants in common; and in case his daughter should happen to die before 21, or without leaving issue on her body lawfully begotten, then over. It was held an estate tail in the daughter. Lord Kenyon, C. J., after adverting to *Roe d. Dodson v. Greiv*,

3. Superadded words of distributive modification, without superadded words of limitation. See § 488, 488a.

Doe d. Candler v. Smith, 17 D. & E. 531.

2 Wils. 323, said, he admitted that in this case the testator intended his daughter to take an estate for life only, and her children as purchasers; but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations; and the latter intention could not be carried into effect unless the daughter took an estate tail.

*Bennett v.
Earl of
Tankerville,*
19 Ves. 170.

[233]

Again; a testator devised to his younger son, to hold to him and his assigns during the term of his natural life, without impeachment of waste; and, from and after his decease, to the heirs of his body, to take as tenants in common and not as joint tenants; and in case of his decease without issue of his body, to his eldest son, his heirs and assigns for ever; and in case both sons should die before 21, over. The Master of the Rolls held that the younger son took an estate tail. And referring to *Strong v. Goff*, 11 East, 668, he said, that it was evidently distinguishable from the other cases, and from the present. That there was not, in that instance, any indication of an intention that the estate should not go over until after an indefinite failure of issue: it was to go over if the children should not attain 21.

*Pierson v.
Vickers, 5
East, 548.*

And even where a testator devised to his daughter and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common; and, in default of such issue, then over. It was argued, on the one hand, that the words "sons or daughters" meant no more than "male or female." On the other hand, the counsel for the defendant contended, that they explained the words "heirs of the body" to mean sons or daughters. But Lord Ellenborough, C. J., asked the counsel for the defendant, how he got rid of the words "in default of such issue?" To this he replied, that they referred to sons and daughters: upon which, Lawrence, J., intimated, that there was nothing in the will to confine the words to issue living at the death of the daughter; and observed, that these words are always construed to mean an indefinite failure of issue, unless restrained by other words. The Court afterwards certified, that the daughter took an estate tail.

*Jesson v.
Wright, 2
Bligh, 51.*

So where a testator devised to *W.*, a natural son of his sister, for life, he keeping the buildings in repair; and, after his decease, to the heirs of the body of *W.*, in such shares and proportions as he should appoint; and, for want of such appointment, then, to the heirs of the body of *W.*, share and share alike, as tenants in common; and if but one child, then, to such only child; and for want of such issue, to the testator's right heirs. It was held by the Court of Queen's Bench, that *W.* took an estate for life only, with remainders to his children, for life, respectively, as tenants in common. But the House of Lords reversed this judgment, and decided

that *W.* took an estate tail. The Lord Chancellor, in moving judgment, remarked, that it was definitively settled, as a rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail; (2 Bligh, 51;) and that, upon the whole, he thought it was clear that the testator intended that all the issue of *W.* should fail, before the estate should go over according to the final limitation. (2 Bligh, 55.) Lord Redesdale expressed himself thus:—
 [234]
 “That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe v. Goff*, it has been held that the words ‘tenants in common,’ do not overrule the legal sense of words of settled meaning. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they could not take in the mode prescribed. This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected.” (*Ib.* 56, 57.) His Lordship added, that it was impossible to decide the case, without holding that *Doe v. Goff* is not law. (*Ib.* 58.) See § 488a.

And so where a testator devised lands to his son-in-law, *Doe d. At-John*, and *Elizabeth* his wife, for their lives, and for the life of the survivor; and, from and immediately after the death of the survivor, then unto the heirs of the body of *Elizabeth*, by *John*, to be equally divided among them, share and share alike. And he devised to *John*, all the residue of his real and personal estate. It was held, upon the authority of the case of *Jesson v. Wright*, (2 Bligh, 1,) that these words created an estate tail, and not a life estate, with remainders to the children of *Elizabeth*, by *John*, notwithstanding the words “to be equally divided between them,” “share and share alike;” and although there was no devise over “for want of such issue,” as in the case of *Jesson v. Wright*. Adol. 944.

In another case, a testator devised to his wife, all his real and personal estate, she first paying his just debts and funeral expenses; and, after her decease, to the heirs of her body, share and share alike, if more than one; and, in default of issue, to be lawfully begotten by him, to be at her own disposal. The testator left his wife and six children him surviving. The Court certified that the wife took only an estate for life, with remainder to all the children as tenants in common in fee. *Gretton v. Howard*, 6 Taunt. 94.
 [235]

This case is distinguishable from all the preceding cases, Observations

on *Gretton v. Haward*.

except the last, in this circumstance; that there is no primary or paramount intent, manifested by the limitation over, to let in all the descendants of the testator and his wife: for, the failure of issue is clearly a failure of issue in the lifetime of the wife. But still it would seem that this decision must be regarded as overruled by *Doe d. Atkinson v. Fetherstone*, where there were words of distributive modification, and no limitation over on an indefinite failure of issue, and yet the Rule was applied.

4. Word sons or daughters, referring to the heirs, if only used in the sense of males or females, &c. See § 481-3.

Poole v. Poole, 3 Bos. & Pul. 620.

4. A reference to the heirs by the name of sons or daughters, will not be construed to control the word heirs, "if it may fairly be held to refer to all the heirs in the sense only of "males" or "females;"(u) or if the construing that word so as to control the word heirs, would seem inconsistent with other parts of the will.

. A testator devised to his first son, for life; remainder to trustees to preserve &c.; and, from and after his decease, to the several heirs male of such first son, so as the elder of such sons, and the heirs male of his body, should always be preferred to the younger and the heirs male of his body; with limitations to the other sons and the daughters of the testator, and the heirs male of their bodies, the elder of such sons and daughters to be preferred &c. Though the word sons in the plural could only apply to the sons of the first son, yet, it was held, that the first son of the testator took an estate tail: for, otherwise, it would be necessary to hold that the testator meant to give a different estate to his eldest son, from that which all the subsequent limitations showed that it was his intention to give to the other sons.

5. Intention [236] that the limitations should be in strict settlement. See Section VI.

Douglas v. Congreve, 1 Beav. 59.

5. Nor will the operation of the Rule be excluded, in the case of legal estates or trusts executed, by the expression of an intention that the limitations should be in strict settlement.

A testator devised real and personal estate to a feme covert, for life, for her independent use and benefit; remainder to her husband, for life; remainder to the heirs of her body, in tail; with remainders over; and he declared, that all the aforesaid limitations were intended to be in strict settlement. The Court of Common Pleas certified, that she took an estate tail in the real estate. And Lord Langdale, M. R., after quoting the words of Lord Thurlow in *Jones v. Morgan*, as to the words, "for life," that the testor, "in all cases, does mean so," said, that the words, "in tail," were merely superfluous; and that, as to the words in strict settlement, there was no executory trust in this case; and that therefore the feme covert took an estate tail in the real estate, and the absolute interest in the personalty.

See § 489.

(u) See *Pierson v. Vickers*, 5 East, 548, as stated § 475.

478 6. *The Rule will be applied even in the case of 6. Super-
a devise to or for the settling of lands on a person added words
for life, and, after his decease, to the heirs male of his body, usually oc-
and the heirs male of the body of every such heir male, ccurring in
severally and successively, or severally, respectively, and in limitations to
remainder, as they should be in priority of birth, and seni- first and
ority of age.(x) other sons in
tail.

In one case, a testator devised to *W. F.* and his heirs, *Fetherston*
male, according to their seniority in age, and their respect- v. *Fether-*
ively attaining the age of 21 years, all his estates real and ston, 3 Clark
personal in lands, houses, and tenements, the elder son sur- & Fin. 67 ;
viving of the said *W. F.*, and the heirs male of his body S.C. 9 Bligh,
lawfully begotten, always to be preferred to the second or 337.
younger son ; and, in case of failure of issue male of the
said *W. F.* surviving him, or their dying unmarried, and
without lawful issue male attaining the age of 21 years, then
over. It was held by the House of Lords, in consonance
with the opinion of the Judges, and in affirmance of the
decrees of the Courts of King's Bench and Exchequer Cham- [237]
ber in Ireland, that *W. F.* took an estate tail. Lord Chief
Justice Tindal, in delivering the opinion of the Judges, said,
that they thought the rule of construction, laid down by
Lord Alvanley in *Poole v. Poole*, 3 Bos. & Pul. 627, was
the safe and correct rule in such cases; namely, "That the
first taker shall be held to take an estate tail, where the de-
vise to him is followed by a limitation to the heirs of his
body, except where the intent of the testator has appeared
so plainly to the contrary, that no one could misunderstand
it." That, applying that rule to the principal case, they by
no means thought that the subsequent words showed a plain
and unequivocal intention to reduce the estate tail in *W. F.*
to an estate for life: on the contrary, they thought them at
least as compatible with an explanation of what the testator
supposed to be the course of descent under an estate tail.
That the words, on "their attaining the age of 21 years,"
could not be urged as an argument against the estate in *W.*
F. being an estate tail; first, because these words would
create the same difficulty against the holding the estate
given to the sons of *W. F.* to be an estate tail, which, on all
hands, was allowed to be the case, if *W. F.* had not the
estate tail in himself; and secondly, because, if the devise,
in other respects, was a devise in tail, the testator could not
by interposing such a condition (if indeed it was to be held
to be a condition) create a new estate, or a new course of
descent not known to the law. That if the words "heirs

(x) *Legat v. Sewell*, 1 Eq. Ab. 395, as stated, Fearn, 113. *Jones v. Mor-*
gan, 1 Bro. C. C. 276, as stated, Fearn, 134. See also *Sayer v. Masterman*,
Amb. 344, as stated, Fearn, 162.

male," were to be construed "sons," the construction would be to abandon a direct devise in tail to *W. F.*, in order to let in a devise of an estate tail by implication only to his first and other sons. And that if the sons of *W. F.* took estates tail, as purchasers, it was far from clear that they could take more than contingent remainders in tail; viz. on the contingency of each son's surviving his father; and it was very difficult to suppose that the testator could intend to postpone the whole of the eldest son's issue to that of the second.

PROPOSITION III.

III. Third general proposition, showing where the Rule does not apply. See § 429-450.

But, if there are any words referring, not merely 479 to the mode of succession, but to the objects of succession, and clearly and unequivocally explaining or indicating them to be individuals other than persons who are to take simply as heirs general or special of the ancestor; (y) the Rule will not apply. For, these words thereby negative the existence of the primary intent, which would otherwise be furnished by the technical word heirs, in connexion with the estate of the ancestor; and thus leave but one intention to be accomplished; namely, the intention that the heirs should take by purchase.

Indication of non-application of Rule either direct or indirect.

Though this explanation or indication must be 480 clear and unequivocal; yet it may be either, 1. Direct; or, 2. Indirect. Thus,

1. Direct explanation or indication that the persons who are to succeed, are not persons who are to take simply as heirs general or special.

1. The Rule will not be applied if there are any 481 words directly and immediately referring to the persons who are to succeed, and clearly and unequivocally explaining them to be persons who are to take, not simply as heirs general or special of the ancestor, but as his sons, daughters, or children; or as his heir apparent, or heir presumptive; or as the person first answering the description of his heir general or special, and the heirs general or special of such heir.

Low v. Davies, 2 Ld. Raym. 1561; as stated, Fearn, 153. See § 476.

Thus, where an estate was devised to *A.* and 482 his heirs lawfully to be begotten; *that is to say*, to the first, second, third, and any other son and sons, successively, as they should be in seniority of age, and priority of birth, the eldest, always, and the heirs of his body, to be preferred before the youngest, and the heirs of his body; it was held that *A.* was tenant for life, with remainder to his first and other sons, successively, in tail.

Goodtitle d. Sweet v. Herring, 1 East, 164, affirmed by

And where a testator devised estates to *M. D.* 483 for her life, without impeachment of waste, re-

mainder to trustees to preserve contingent remainders, and House of
from and after her decease, then to the heirs male of the Lords,
body of the said *M. D.* to be begotten, severally, successively, printed
and in remainder, one after another, as they and every of [239]
them should be in seniority of age, and priority of birth, the Cases, 1801.
elder of such sons, and the heirs male of his body, being See also
always preferred before the younger of such son and sons, *Lisle v.*
and the heirs male of his and their body and bodies; and *Gray*, 2 Lev.
for want of such issue, then to the daughters, &c.; and in 223; Raym.
default of such issue, over. 278; as

Again, by a marriage settlement, lands were limited to the husband, for life; remainder to the wife, for life; remainder to the heirs of the body of the husband, on the body of the wife to be begotten, and their heirs; and if more children than one, equally to be divided among them, to take as tenants in common; and, for default of such issue, to the wife and her heirs. Sir L. Shadwell, V. C., said, that if it had not been for the words, "and if more children than one," the husband would have taken an estate in tail special, notwithstanding the superadded words of limitation; but that the words, "and if more children than one," must be taken to be interpretative words, showing that "heirs" meant "children;" and hence, that the words, "for default of such issue," meant "for default of such children;" and consequently the children took, by purchase, estates in common in fee in the freeholds and copyholds, and the absolute interest in the leaseholds.

484 ... 2. The Rule will not be applied if there are any 2. Indirect words mediately or indirectly, yet unequivocally, explanation denoting, that the persons who are to succeed are individuals or indication. other than persons who are to take simply as heirs general or special of the ancestor.

The reported cases exhibit six ways at least in which the word *heir* or *heirs* has been thus indirectly explained and divested of its most usual meaning:

485 (1) * By superadding words of limitation, in fee (1) Word.
or in tail, to the word heir, when used in the sin- heir, with
gular number. (2) superadded

It is true, that the word heir, as we have seen, may be [240]
used as a *nomen collectivum*; but since the heir may also words of
properly be deemed to be *persona designata*, and such is in limitation.
fact the natural meaning of the word, when there are super- See § 473-4.
added words of limitation to the heirs general or special of
such heir; it is to be presumed that the testator intended the

(s) *Archer's Case*, 1 Co. 68; as stated, *Pearce*, 150. *Willis v. Hiczer*, 4 M. & C. 197. *Chest or Clark v. Day or Davy*, Moor, 593; as stated, *Pearce*, 150. *Walker v. Snow*, Palm. 359; as stated, *Fearne*, 151.

distinction between the singular and plural number, and did not use the word heir as *nomen collectivum*.

(2) Limitation to the heir for life.

See § 460.

(2)^a By expressly limiting to the heir in the singular number for life. (a) 486

In this case, the inheritance is not limited; and therefore the heir could not take simply as heir; for, an heir is one upon whom the law casts the inheritance upon the decease of the ancestor.

(3) Super-added words of limitation which limit the estate to persons of a different sex. See § 474.

(3) By superadding to the first words of inheritance, other words of limitation, which limit an estate in such a manner as to be descendible exclusively to persons of a different sex; as, where land is limited to the heirs male, and their heirs female. 487

These superadded words clearly show, that the heirs male, the heirs first named, were not intended to take simply as heirs special; since, if they were to take simply in that character, *they*, and they *alone*, would take the inheritance; or, in other words, the inheritance would devolve from time to time upon, and be exclusively and perpetually enjoyed by, *heirs male*; whereas the inheritance, by the express words, is to go to the heirs male, *and their heirs female*.

(4) Words of distributive modification, with [241] superadded words of limitation. See § 475.

(4) By prescribing for the heirs general or special, a distributive mode of taking, and also superadding words of limitation: as *to A. for life, remainder to the heirs, of his body, as well females as males, as tenants in common, (or share and share alike, or, without any respect to be had in regard to seniority of age or priority of birth,) and their heirs and assigns for ever.* (b) 488

The mere addition of words of distributive modification would be equivocal: for, the grantor or testator might have erroneously supposed that the heirs might take in that character, and yet in a partitive mode; but the engrafting of superadded words of limitation, besides the addition of words of distributive modification, shows clearly that he meant by the first named heirs, the children of the ancestor, who are sometimes so termed, as having the capacity of becoming heirs of the ancestor, either in succession, if males, or contemporaneously, if females.

(5) Words of distributive modification, with a limitation

(5) By prescribing a distributive mode for the heirs general or special to take, and also limiting over the property in case the heirs, under the referential designation of such issue, should die before a certain age. 488a

A testator devised to his daughter *M.*, and the heirs of

(a) *White v. Collins*, Com. R. 289; as stated, Fearn, 158.

(b) *Doe v. Laming*, 2 Burr. 1100, as stated, Fearn, 154. *Crump v. Norwood*, stated § 488a. The same point was established by *Doe v. Ironmonger*, stated § 387; and *Right v. Creber*, 5 Bar. & Crea. 866.

her body begotten or to be begotten, as tenants in common; over in case but if such issue should die before he, she, or they attained of the death 21, then to his son *J.*, in fee. And then he devised another of such issue estate to his son, *J.*, and to the heirs of his body begotten or under a certain age. to be begotten; but, if he died without issue, or such issue all died before he or they attained 21, then to *M.*, and the See § 475. heirs of her body begotten or to be begotten; such issue, if *Doe d.* more than one, to take as tenants in common. It was held, *Strong v. Goff*, 11 East, 668. that *M.* took for life only, in the first estate, with remainder to her children as purchasers; the words "such issue," taken in connection with the event spoken of, that of such issue dying before he, she, or they attained 21, clearly showing that the words "heirs of the body" were equivalent to children of her body; and there being a particular intent that the issue should take as tenants in common, which was inconsistent with an estate tail, and no other paramount general intent. [242]

This decision was impeached by Lord Redesdale in *Jes- Observations son v. Wright*; (c) but His Lordship appears to have been on *Doe d.* labouring under some confusion of ideas upon the subject. *Strong v. Goff*. He remarked, that the provision, in case such issue should die before 21, seemed to him so far from amounting to a declaration that the testator did not mean heirs of the body in the technical sense, that he thought they peculiarly showed that he did so mean; for, they would otherwise be wholly insensible: if they did not take an estate tail, it was perfectly immaterial whether they died before or after 21. Now it is true that these words would seem to show that the children took an estate-tail; but they also clearly showed, as Lord Ellenborough, C. J., observed, that the words, "heirs of the body," to which they referred, meant children; and consequently that the mother did not take an estate tail: and the only question which was actually raised, seems to have been, whether the mother, who was dead, took for life only, or in tail. The question, whether the children, who were held to take by purchase, took an estate tail, does not appear to have been raised or decided.

Again; a testator devised gavelkind land to his nephews, *Crump v. W. C., J. C., and R. C.*, equally between them, during their *Norwood*, 7 respective lives, as tenants in common; and, after their Taunt. 362, several and respective decease, he devised the part and 2 Marsh. share of him or them so dying, unto the heirs lawfully 161. issuing of his or their body and bodies; and if more than one, equally, as tenants in common; and if but one, to such only one; and to his, her, or their heirs and assigns for ever. And if any of his said nephews should die without such

(c) 2 Bligh, 51; stated § 475. See remarks on this case in *Bennett v. Earl of Tankerville*, 19 Ves, 170; stated § 475.

issue, or leaving any such, they all should die without attaining 21, then the share of him and them so dying unto the survivor and survivors of his said nephews &c. Lord Chief Justice Gibbs, who delivered the judgment of the Court, said, that it was agreed on all hands, that this was a devise to *W. C.*, for life; and if he had children, then, to them in fee; if he had no children, then, the estate was to go to *J. C.* and *R. C.* (7 Taunt. 370.) That this, therefore, like the case of *Doe d. Davy v. Burnsall*, was a contingent remainder with a double aspect (*Ib.* 372); and a portion of the reversion having descended on *W. C.*, so much of the contingent remainder as was co-extensive with that portion of the reversion, was destroyed; because the particular estate supporting the remainder was destroyed by the union of the particular estate and the reversion. (*Ib.* 371, 373.)

[243]

See § 128-136a.

See § 766, 777, 779.

(6) By blending a limitation to the heirs of the body of another person, and superadding words of limitation.

(6) ^d By blending into one, a limitation to the heirs of the body of the tenant for life, and a limitation to the heirs of the body of another person, where the heirs of the body of such other person could not take otherwise than by purchase; and by superadding words of limitation to the heirs and assigns of all such heirs of the body alike. (*d*)

SECTION THE FIFTH.

General Observation on the Aid afforded, in the application of the Rule, by Implication from a Limitation over on Failure of Issue.

In the majority of the cases above stated where it was most difficult to apply the Rule, the Courts were aided, in their application of the Rule, by the existence of a limitation over on an indefinite failure of issue generally, or on an indefinite failure of such issue as were before spoken of, and intended to be capable of inheriting under the prior limitations. And the Courts of course gladly laid hold of the implication of a primary or paramount intention to admit all the descendants generally or of the given description, so far as the rules of descent would permit, arising from such a limitation over, where there was any such limitation, rather than rest their decision, in giving an estate tail to the ancestor, upon the single operation of the Rule. But still, it is conceived, that even if, in these cases, there had been no such limitation over, the decision would have been the same. For, though it would then have been less clear that an estate tail should be given to the ancestor, yet upon a due consideration of the prin-

See § 564a-564c.

[244]

(d) *Allgood v. Withers*, as stated, Fearn, 120.

ciples contained in the third section, it might have been seen that the cases above referred to were cases for the application of the Rule.

SECTION THE SIXTH.

The Application and Non-application of the Rule, in Cases of Trusts Executory.

489 * An executory trust, as opposed to a trust executed, is a trust raised by a stipulation or direction, an executory in marriage articles, or in a deed or will, to make a conveyance, settlement, or assurance, to uses, or upon trusts, which do not appear to be formally and finally declared by the instrument containing such stipulation or direction. (a)

490 I. ^b The Rule is not applied in the case of executory trusts created by will, if there is a clear indication of an intent that it should not be applied. (b) But, in the absence of any such indication, it will be applied. I. Rule as to trusts created by will.

491 * In the case of trusts executed, the limitations may be deemed to receive their intended shape from the words of the deed or will itself. But, in the case of trusts executory, the party may fairly be understood to leave the limitations to be perfected by the conveyance, settlement, or assurance; stipulated or directed by him, and to have intended that the conveyance, settlement, or assurance, should avoid or correct any relative inconsistencies, or technical obstacles, arising from impropriety of expression, to the apparent general scope of the conveyance, settlement, or assurance; so directed by him. (c) Ground of distinction between trusts executed and trusts executory.

492 Hence, in cases of trust executory, the Court has not applied the Rule where the testator ^d expressed his desire, that it should never be in the power of the ancestor to dock the entail; (d) or ^e where his estate for life was without impeachment of waste, and there was a limitation to trustees during his life to preserve contingent remainders. (e) [245] Illustrations of the foregoing rule.

493 But the Courts will apply the Rule to trusts executory created by will, even where the word

(a) See *White v. Thornburgh*, 2 Vern. 702; and *Austen v. Taylor*, Amb. 376; as stated, Fearn, 110, 133—4. And see Prest. View of the Rule, 126—130, and cases there cited. And Fearn, 137—144.

(b) *White v. Carter*, Amb. 670, as stated, Fearn, 184.

(c) Fearn, 141, 144.

(d) *Leonard v. Earl of Sussex*, 2 Vern. 526, as stated, Fearn, 115.

(e) *Papillon v. Voice*, 2 P. W. 471, as stated, Fearn, 115.

heir is used in the singular, if there are no particular indications of a contrary intent.

Blackburne v. Stables, 2 V. & B. 367. Thus, where real estate was devised in trust for a son of the testator's nephew, at the age of 24; with limitations over, if he had no son; and with a direction that the executors should not give up their trust till a proper entail be made to the male heir by him. Sir W. Grant, M. R., held, that this was an executory trust; but that a son who was in *ventre sa mere* took an estate tail. He observed, that in the case of a will, there was no presumption that one quantity of interest was meant more than another; for, the subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given.

II. Rule as to trusts executory created by marriage settlement, with the exceptions thereto. II. In the case of executory trusts created by marriage articles, the Court of Chancery will refuse to apply the Rule, even in the absence of particular indications of an intent that it should not be applied, except,

1. In those cases where it is not in the power of either parent, without the other, to bar the issue.

2. Where the issue are otherwise effectually provided for by the articles; or it appears, from other limitations, that the parties knew and intended the distinction between words which give the parent an estate for life only, and those which would give him an estate tail.

3. Where a trust, created by a formal settlement not expressed or not clearly appearing to be made in pursuance of the articles, is substituted for the articles.

[246] Distinction between trusts executed and trusts executory is more strongly marked in the case of those created by marriage settlement. Illustrations The reason for not extending the Rule to trusts executory, applies with peculiar force to those created by marriage articles; because marriage articles are considered as mere heads of agreement; and a principal intention is, to secure an effectual provision for the issue, who are all purchasers for valuable consideration, and not mere volunteers, like devisees. (f)

Hence, where it is agreed to limit lands to the husband for life, remainder to the heirs of his body, by his intended wife, (g) or, to the wife for life, remainder to the heirs of her body, by her intended husband, (h) or to the husband and wife for life, remainder to the heirs of their bodies; (i) these words are construed to mean

(f) Fearn, 112.

(g) *Trevor v. Trevor*, 1 Eq. Ab. 387; and 2 Brown's Cases Parl. 132; as stated, Fearn, 90—92.

(h) *Jones v. Langhton*, 1 Eq. Ca. Ab. 392, as stated, Fearn, 93.

(i) *Cusack v. Cusack*, 1 Brown's Cases Parl. 470; and *Nandick v. Wilkes*, 1 Eq. Ab. 393, c. 5; 1 Gilb. Eq. Rep. 114; as stated, Fearn, 93.

first and other sons of the marriage, and the heirs of their of the second
bodies. foregoing rule.

497 And ^k where it is agreed to limit lands to the rule.

husband for life, remainder to the heirs male of
his body, remainder to the heirs female of his body, the
expression heirs female will be taken to denote

498 daughters; (^k) though a remainder to the heirs of
the body, following one to the first and other sons,
will not be so construed, where, at least, an express pecu-
niary provision is made for the daughters, for, it may
extend to the daughters of sons, as well as the daughters of
the marriage. (^l)

499 And ^m post-nuptial settlements, and even pre-
nuptial settlements, if purporting or appearing to
be made in pursuance of such articles, but conferring an
estate tail on the ancestor, will be rectified accordingly, (^m)
ⁿ except against a purchaser for valuable consideration with-
out notice. (ⁿ)

[247]

But, as already intimated,

500 1. The Rule takes place in marriage articles, Cases consti-

^o where the parent may take an estate tail, without tuting the
leaving it in the power of either parent singly, to bar the first excep-
issue, either during or after the coverture: as, where the tion to the
wife alone takes an estate tail *ex provisione viri*; in which second of the
case, as the husband takes no estate tail, he cannot bar the foregoing
issue, either during the coverture, or afterwards; and the rules.
wife, of course, cannot bar it during the coverture without
his consent; nor can she bar it afterwards, because she is

prevented by the statute of Hen. VII. (^o)

501 2. The Rule has also been allowed, ^p where, in 2. Cases con-
the articles, the issue are provided for by another stituting the
fund or estate, limited in strict settlement, (^p) or ^q in such a second ex-
way, that neither parent could bar it alone; (^q) or, by an ception.

(^k) *West v. Errissey*, 2 P. W. 349, as stated, Fearn, 100, 101.

(^l) Fearn, 101—104; and *Powell v. Price*, 2 P. W. 535, as there stated.

(^m) *Streetfield v. Streetfield*, Cas. Temp. Talb. 176, as stated, Fearn, 92.
Honor v. Honor, 2 Vern. 658; 1 P. W. 123, as stated; Fearn, 98. *West v. Errissey*, 2 P. W. 349, as stated, Fearn, 100. *Roberts v. Kingsley*, 1 Ves. Sen. 238, as stated, Fearn, 104, 105; overruling *Burton v. Hastings*, Gilb. Eq. Rep. 113, as stated, Fearn, 99.

(ⁿ) Fearn, 108, 109; and *Warwick v. Warwick*, 3 Atk. 291, as there stated.

(^o) Fearn, 94. And *Honor v. Honor*, 1 P. W. 123; *Whateley v. Kemp*, cited 2 Ves. Sen. 358; *Green v. Ellins*, 2 Atk. 473; and *Highway v. Banner*, 1 Bro. C. C. 584, as stated, Fearn, 94—96.

(^p) *Chambers v. Chambers*, Fitz-Gibb. Rep. 127; 2 Eq. Ab. 35, c. 4; as stated, Fearn, 96.

(^q) *Howell v. Howell*, 2 Ves. Sen. 358, as stated, Fearn, 97.

express pecuniary provision; because these circumstances show that the parties themselves knew and intended the distinction.

3. The third exception.

3. And where both articles and settlement are previous to marriage, the settlement, unless expressed to be made in pursuance of the articles, will control the articles, and the words will be left to their legal operation; because it will be considered to be a new agreement respecting the terms of the marriage; which the parties are at liberty to make before marriage, though not afterwards.

502

CHAPTER THE THIRTEENTH.

THIRD EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, WHERE REAL ESTATE IS DEVISED TO A PERSON AND TO HIS ISSUE, AND THE WORD ISSUE IS CONSTRUED TO BE A WORD OF LIMITATION, BY ANALOGY TO THE RULE IN SHELLEY'S CASE, AND UNDER THE CY PRES DOCTRINE.

Difficulty of construing devises to or for a person and his issue, express or implied.

PERHAPS there is no one single point, in the whole range of legal learning, involved in more uncertainty and difficulty, than that of the construction of the word issue in express or implied devises to or for a person and his issue. But yet, after a patient comparison of the cases, and a full consideration of the distinctions which principle would seem to suggest, the construction of such devises, may, it is conceived, be reduced to a system harmonising almost all the cases, and commending itself to reason and the analogy of law.

503

Where the word issue is a word of limitation, in the case of direct devises and trusts executed.

See § 489, 531-2.

See § 403.

I. Where real estate is devised, either directly to, or by way of executed trust for, a person and his issue, whether in one unbroken limitation, or in two distinct limitations, the word "issue" will be construed a word of limitation, (a) so as to confer on the ancestor an estate tail, if there are no expressions clearly showing, that, by issue, the testator meant children, or particular individuals among the descendants of the ancestor, and no expressions indicative of an intent that the issue should take by purchase, or none but what are capable of being resolved into the mere redundant expression of that which would be included in an estate tail in the ancestor.

504

(a) But see *Williams v. Jekyl*, and *Elliott v. Jekyl*, 2 Ves. Sen. 681; as stated, *Fearne*, 499; which was a case of a lease for lives.

505 II. But if there are any expressions clearly showing, that, by issue, the testator meant children, or particular individuals among his descendants, or any expressions indicative of an intent absolutely inconsistent with, or not included in, an estate tail in the ancestor; then, the word issue will be construed a word of purchase, if the issue may take as purchasers consistently with the rule against perpetuities; and the ancestor will take an estate for life, with a contingent or a vested remainder to his issue, as the case may be. Where the word issue is a word of purchase, in the case of direct devises and trusts executory. See § 403-4, 533a.

506 Or, to embrace both rules in one short proposition:— Rule embracing both the preceding rules.

Where real estate is devised, either directly to, or by way of executed trust for, a person and his issue, the word issue will be construed a word of limitation, so as to confer an estate tail on the ancestor, unless there are expressions unequivocally indicative of a contrary lawful intent.

507 "The word issue," as Mr. Baron Alderson justly remarked, "is used in different senses, either as including all descendants, or as confined to immediate descendants, or some particular class of descendants living at a given time." Different senses of the word issue.

508 Chief Justice Wilmot observed, in *Roe v. Grew*, 2 Wils. 322, and Lord Kenyon, C. J., in *Doe d. Cooper v. Collis*, 4 Durn. & E. 294, "in a will, issue is either a word of purchase or of limitation, as will best answer the intention of the devisor, though; in the case of a deed, it is universally a word of purchase." Issue is a word either of purchase or of limitation in a will; but always a word of purchase in a deed.

509 The word issue is a word of purchase in a deed; (b) because, in a deed, no word, except the word heirs, will pass an estate of inheritance; and hence the word issue cannot there be a word of limitation. It is therefore a word of purchase; in this case; because that is the only construction by which it can become operative, and not because it is aptly a word of purchase. Why it is a word of purchase in a deed.

510 For, in consequence of its ambiguity and latitude of meaning, it has been considered by some, as extremely unfit for a word of purchase, unless assisted by other expressions. A word of purchase should be determinate; whereas the word issue is so far indeterminate, in the case of a limitation to the issue, if it were intended that the issue should take by purchase, that it seems to have been the opinion of Sir Thomas Plumer, that it would be difficult to determine whether all the descendants who are living are to take by purchase, or only the immediate descendants or children: and if all the descendants are so to take; whether they are to take *per stirpes* or in

It is ill-adapted for a word of purchase. See § 408. [250]

(b) *Wheeler v. Duke*, 1 Crompt. & Mees. 210.

capita. (c) But admitting, "according to the opinion 511 of Sir W. Grant, M. R., that issue, unconfined by any indication of intention, includes all descendants, and that a necessary consequence is, that the division must be *per capita*, among those who are living; (d) is it likely, not to say certain, that this was the intention of the testator? If he left one son, and ten grandchildren by a daughter, is it likely he would wish the property to be divided equally between his twelve descendants? or, supposing the daughter to be dead, between his eleven descendants? Is it not more likely that he would wish the son and daughter to take alone by purchase, in the first case, and the grandchildren to take their parent's share only, in the second case? Whether, then, we regard the word issue, 512 unassisted by other expressions, as indeterminate, or as determinate, in the only sense in which, according to Sir W. Grant's opinion, and upon principle, it can be determinate, namely, as including all the descendants, and pointing out all the descendants who are living as purchasers *per capita*; it must be evident, that it is by no means adapted for a word of purchase.

But it is well adapted for a word of limitation. See § 404.

On the other hand, though the word issue is not 513 the technical word of limitation, yet as soon as it is used in a will as a word of limitation, and consequently becomes subject to the operation of the rules of descent, it possesses the same aptitude for this purpose, as the technical expression heirs of the body, which it most nearly resembles, and for which, in fact, it is used as a synonyme in the Statute *De Donis*. It is as well adapted, therefore, for a word of limitation, as it is ill adapted for a word of purchase. And for this reason, as well as for 514 the purpose of giving effect, as will presently appear, to the paramount intent of the testator, it is construed a word of limitation, including all the descendants *in infinitum*, unless there are expressions which indicate, that, by issue, the testator meant children, or particular individuals only among the descendants of the ancestor, or words which unequivocally show that he intended the issue to take by purchase.

How the testator may manifest an intention that the word issue should

The testator may manifest this intention by "directing that the ancestor shall take for life *only*;" (e) 515 or that the issue shall take distributively, as tenants in common, or otherwise; or that such issue only should take as should attain a given age; or by any other unequivocal manifestation of an intent which would be inconsistent with,

(c) See Sir Thomas Plumer's observations in *Lyon v. Michell*, *infra*.

(d) *Leigh v. Norbury*, 13 Ves. Jun. 344.

(e) *Backhouse v. Wells*, 1 Eq. Abr. 184, pl. 27, as stated, Fearn, 152.

or would not be accomplished by giving the ancestor, an not be a word estate tail, and admitting the issue by descent from him, in of limitation. stead of by purchase. It must be observed, however, that See § 530. 'such manifestation of intent may be counterbalanced by any other clauses or expressions indicative of an opposite intent.(f)

516 And this brings us to the question, whether he It is not manifest that such was his meaning or intention, when, to the word issue, he superadds the words of superadding limitation, to their heirs, or to the heirs of their bodies. At words of limitation, or giving the first sight, it would certainly appear that this clearly indicates, that he uses the word issue in the sense of children; and that he intended that they should take by purchase: ancestor an estate expressly for life, or without impeachment of waste. But these expressions are not sufficient to convert the word issue into a word of purchase;(g) or, in other words, to prevent it from operating as a word of limitation, and thereby giving the ancestor an estate tail. They do not unequivocally and with certainty denote that the testator intended that the ancestor should take a life estate only, and that his issue should take by purchase. All these expressions, though, at first sight, they seem clearly and positively to do this, may, after all, be resolved into the mere redundancies of an unprofessional style, into the mere useless expression of that which would be included in an estate tail in the ancestor, instead of that which is inconsistent with an estate tail in him. [252] waste.

517 For the same reason, where the devise to the Nor by introducing issue is introduced by words of contingency, *prima facie*, importing a condition precedent, (See § 13,) but the words of condition would have been necessarily implied, (as, 'if he contingency should leave any issue); this, of itself, will not create a contingent interest in favour of the issue, by purchase, and prevent the ancestor from taking an estate tail.(h) have been implied.

518 Again; 'where the devise to the ancestor is for Nor by prohibiting life, and he is expressly forbidden to commit prohibiting the waste,(h) even this does not show with certainty, that the ancestor testator intended the ancestor to take for a life estate only, from committing the issue to take by purchase. For this may only amount to the attempt to create an estate possessing the distinctive essential qualities of an estate tail, as regards the waste.

(f) See *King v. Burchell*, Amb. 379, as stated and commented on, Fearn, 163—4.

(g) See Lord Talbot's observations in *Lord Glenorchy v. Bosville*, Cas. Temp. Talb. 3. M. 1733, as stated, Fearn, 117.

(h) *Shaw v. Weigh*, 2 Stra. 798; S. C. 1 Eq. Ca. Ab. 184, pl. 26.

acquisition and transmission of the property by and to certain designated objects, and yet deprived of some of the inseparable incidents of an ordinary estate tail.

These indications are equivocal.

It may indeed be highly probable, in these cases, that the intention was, that the ancestor should take a life estate only, and that the issue should take by purchase. But as it is not unequivocal and certain, the law will not take this view of the testator's intention, because, if it were to do so, it would be thereby sacrificing a more important intent.

Another ground of the foregoing

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rules; namely, two co-existing yet inconsistent intents, the one of which must be sacrificed to the other. Compare § 429, 564b.

For, even in the cases treated of in the present chapter, where the devise is to the issue, and not the heirs generally, or heirs of the body, *eo nomine*, as in the cases in the preceding chapter, and where there is no devise over to take effect on an indefinite failure of issue, as in the cases in the seventeenth chapter, there are two co-existing yet inconsistent intents; the one of which may be termed the primary or paramount intent, and the other, the secondary or minor intent. And as these, by reason of their inconsistency, cannot be both effectuated, the secondary or minor intent is sacrificed, in order to give effect to the primary or paramount intent.

Definition of the primary or paramount intent.

Compare § 430, 564b.

The primary or paramount intent, in the cases treated of in this chapter, is, that the ancestor should have the enjoyment of the estate for his life; and, subject thereto, that the estate should descend to all his descendants, so far as the rules of descent will permit.

Definition of the secondary or minor intent.

The secondary or minor intent is, to accomplish the primary or paramount intent in a particular mode; in such a mode, at least as the deviser supposes, as to secure that primary or paramount intent from being defeated by the act of the ancestor: in other words, the secondary or minor intent is, that the ancestor should have a life estate only, and that his issue should take by purchase.

By what the primary or paramount intent is imported or evidenced. Compare § 432, 564c. See § 511.

This primary or paramount intent, in the cases treated of in the present chapter, is not indeed expressed by any positive declaration, or, as in the cases in the preceding chapter, by the use of the technical word heirs; but yet there is "a vehement presumption" of its existence, not excluded by any unequivocal expressions to the contrary, nor resting in mere conjecture, but, on the contrary, supported by the *prima facie* sense of the word issue.

For, even in the cases treated of in the present chapter, where the devise is not to the heirs, generally, or heirs of the body, and where there is no devise over

to take effect on an indefinite failure of issue, if there is no unequivocal and certain indication of an intent that the ancestor should take a life estate only, and that the issue should take by purchase; there then exists a vehement presumption of an intention, that all the descendants of the ancestor should be admitted, and not that the estate should revert before all the descendants of the ancestor should have failed. In these cases, indeed, the ancestor was not the sole ascertained object of the testator's bounty, as he was in the case of a devise to a person and the heirs of his body. But yet he was evidently the original attracting object, "the groundwork of the testator's bounty:" and, in the absence of some apparent grounds of distinction and preference, all persons answering the description of issue of the ancestor, in the sense in which the word issue is used, must have an equal claim, (apart from the operation of the rules of descent,) founded entirely upon their common relationship, as such issue, to the ancestor. And we have already seen, that where real estate is devised to a person and his issue, and the word issue is unassisted by any other expressions indicating that by issue, the testator meant children, or particular individuals only among the descendants of the ancestor, or unequivocally showing that he intended the issue to take by purchase; the word issue includes all the descendants. So that all the descendants must have an equal claim, apart from the operation of the rules of descent: and it must have been intended that all should accordingly take, so far as the rules of descent would allow.

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See § 432.

525 If, in the cases to which the present chapter relates, the children were to take by purchase according to the supposed secondary intent, then, if any child died in the lifetime of the testator, leaving issue, that issue would take nothing; for, the issue of the deceased child would, according to the hypothesis, only take by descent from their parent; and, as the parent took nothing, they could take nothing by descent from him: whereas, if the word issue were a word of limitation, and the ancestor, the father or mother of such deceased child, were to take the estate tail, instead of the children, then the issue of the deceased child would be capable of taking by descent from the ancestor, the first purchaser of the estate tail, so that the primary intent of the testator would be accomplished; for, all the descendants of the ancestor would be admitted, before the estate would revert or go over.

Observations showing the expediency and propriety of construing the word issue as a word of limitation, in order to effectuate the primary or paramount intent, in cases falling within the first rule.

526 Hence, the law will not restrict the estate of the ancestor to a life estate, and give the inheritance to the issue as purchasers, where it is not certain that such was the intent of the testator; because, in this case, there is, on the one hand, an apparent primary or paramount intent, founded in the most vehement presumption; and, on the

[255]

other hand, an apparently, and only an apparently, certain secondary or minor intent; and hence there is nothing sufficiently express and unequivocal to exclude or negative the apparent primary intent; and consequently such apparent primary or paramount intent is justly allowed to overrule the apparent secondary or minor intent.

Observations showing the propriety of construing the word issue a word of purchase, in cases falling within the second rule.

But, where the testator has expressly and unequivocally manifested his intention that the issue should take by purchase, by expressly 'restricting the ancestor to an estate for life *only*; (i) or by desiring that the issue should take in a way in which they could not take, if they came in by descent; then, indeed, * unless these indications of an intent that the issue should take as purchasers, are counterbalanced by other indications of an opposite intent, (k) the word issue is construed a word of purchase; and the ancestor takes an estate for life, with a contingent remainder to his issue, if unborn, or a vested remainder, if born and ascertained, with a remainder over to the ancestor in tail, in case there is a devise over on an indefinite failure of his issue, as we shall see in the seventeenth chapter. For, in this case, there is no question between a primary and a secondary intent; for, as the intent that the issue should take by purchase, is not a matter of conjecture, presumption, or construction, however probable, but an intent unequivocally expressed, it excludes or negatives the supposition of the existence of any incompatible intent, arising merely from a presumption, however vehement, supported by the *prima facie* meaning of the word issue.

See § 521, 523-4.

There is less presumption against construing issue [256] a word of purchase than against construing heirs a word of purchase, especially heirs generally

There is a less degree of presumption, against construing the word issue, a word of purchase, than against construing the words heirs of the body to be words of purchase; and a still less degree of presumption against that construction of the word issue, than against the same construction of the word heirs generally: so that, *prima facie*, the word issue is more likely to be a word of purchase than the words heirs of the body; and still more likely than the word heirs generally. For, we have seen that the heirs general of the first heir general of the ancestor, may not be the heirs of the ancestor himself: whereas, the issue of the more immediate issue, or, in other words, of the children and grandchildren of the ancestor, are also the issue of the ancestor himself. And, as regards heirs special, though the heirs of the body of the first heir of the ancestor's body, are also heirs of the body of the ancestor himself; yet the heirs of the body are not ascertained; for, *nemo est hæres viventis*;

See § 383-4.

(i) *Backhouse v. Wells*, 1 Eq. Abr. 184, pl. 27, as stated; *Fearne*, 152.

(k) See *King v. Burckell*, Amb. 379, as stated and commented on, *Fearne*, 163-4.

and it may be uncertain whether the person who may first answer the description of heir of the body of the ancestor, will be his child, grandchild, or great-grandchild. And, consequently, in a devise to a person and the heirs of his body, the ancestor is the sole ascertained object of the testator's bounty; and all who may answer the description of heirs of his body, have an equal claim, founded entirely on their common relationship to him, as the sole ascertained as well as the original attracting object of the testator's bounty. Whereas, in a devise to a person and his issue, the issue, if already born, are ascertained in every respect; and, even if unborn, still they are only unascertained, because unborn, and not in respect of the necessity of sustaining a certain character, which may not be sustained by any one more nearly related to the ancestor, than in the third degree. And hence there is a less antecedent improbability that the word issue, than that the word heirs, should be used as synonymous with children of the ancestor or his descendants living at a certain time; and this is especially the case with the word heirs generally, as contradistinguished from heirs of the body.

529 The first of the foregoing rules, which shows in what instances the word issue is construed a word of limitation, may be illustrated by a case, which, although a case of personal estate, was decided with express reference to real estate; and consequently may be cited in illustration of the rule above laid down. In that case, a residue of personal estate was directed by will to be divided equally among the testator's sons, share and share alike, as tenants in common, and to the issue of their several and respective bodies; but, in case of the death of any or either of them, without issue living at the time of his or their respective deaths, then, the part or share of him or them so dying to go to the survivors and survivor, equally, share and share alike, and to the issue of their several and respective bodies. Sir Thomas Plumer, V. G., held, that as the words would have created an express estate tail, if applied to real estate, the four sons took absolute interests in the personal estate according to the general rule; (1 Mad. 475;) but, that on the death of one of the sons without issue, his share survived to his brothers, 600. by way of executory devise, which was not too remote, because it was to take effect, not on an indefinite failure of issue, but on the failure of issue living at the death of the party. (*Ib.* 470.) His Honour observed, that the sons had no issue at the time; and that the word issue was generally used, in a will, as a word of limitation: That if the word issue was there a word of purchase, it must be used either for the purpose of making them tenants in common with their parents, or to enable them to take in remainder. That

[257]
Lyon v. Mitchell, 1 Mad. 478.

See § 593.
See § 706, 714.

if it was intended to make them tenants in common with their parents, it came after the description of those who were to be tenants in common, and it would be difficult to fix upon the persons who were to take as issue; that word including grand-children as well as children, and to determine the proportions in which they were to take; and that if they were to take in remainder, the same difficulty would occur.

Tate v. Clark, 1 Beav. 100. See also *Goodright v. Wright*, 1 P. W. 397, as stated, *Fearne*, 165. [258] *Franklin v. Lay*, 6 Mad. 258, stated, *infra*.

And where *A.* devised real estate to his widow, for life; with remainder to trustees, to pay costs &c., and to divide the residue of the rents amongst all his brothers and sisters who should be living at the time of the decease of his wife, and to their issue male and female, after the respective deceases of his said brothers and sisters, for ever, to be equally divided between and amongst them. Lord Langdale, M. R., said, that the word issue is a word of limitation, if the context of the will does not afford sufficient reasons to construe it otherwise. That the words of distribution might be applied to the brothers and sisters; and that though it was most unlikely that the testator should have intended to make no provision for the children of a brother and sister who died in the lifetime of the widow; [and though there was no gift over in default of issue, a circumstance to which His Lordship also adverted;] yet, being unable to find such clear indications of intention that the technical words should not have their ordinary effect, he must hold, that the children of a sister who died in the lifetime of the widow took nothing. And a similar decision was made with respect to the personal estate.

Observations on *Tate v. Clark*.

The words of distribution not only *may* be applied to the brothers and sisters, but they seem in fact exclusively to belong to them; for, the word "them;" whether explained by the next antecedent, or by the foregoing word "their," properly refers to the brothers and sisters alone. And hence this decision is clearly in conformity with the general current of authorities. But, it may be observed, that when the learned Judge speaks of the word "issue" male as a technical word, he must be understood to mean, a word to which the technical signification of heirs of the body is ordinarily attached in the absence of other words; and not that, like the word "heir," it is intrinsically a technical word; a word of such a nature as to control the force of other expressions, unless translated, as it were, into a popular word, by such other expressions.

Compare § 383, 453, 472, 479.

The following cases, where the word issue was construed a word of purchase, will illustrate the second of the foregoing rules. 530

Hockley v. Mawbey, 1 Ves. 142.

A testator devised his freehold and leasehold estates to his wife, for life; remainder to her son, and his issue lawfully begotten or to be begotten, to be divided among them

as he should think fit; and, in case he should die without issue, he directed that the estate should be sold, and the produce divided among certain other persons. The Lord Chancellor held, that there was a contingency with a double aspect; in the one case, to the children of the son; in the other, to the other persons pointed out. That it was clear that he did not intend the estate to go to the issue, as heirs in tail: for, he meant that they should take it distributively, and according to proportions to be fixed by the son. That it had been often decided, that where there is a gift in that way, the parties must take as purchasers; for, there is no other way for them to take. That if the gift was not divided by the son among his children, it was a gift to them equally; as the testator intended to vest an interest in the children of his son independently of the son, except as to the proportions. That it was true that the word "issue" would extend to descendants, however remote, but only as a description of the objects among whom the power of the son was to obtain to make partition. That it was an estate devised upon two alternative contingencies; one, that there were objects capable of taking under the first limitation; another, that there were none such, but that there were objects capable of taking under the second. See § 128. 136. [259]

Again; a testator devised to his niece, and the issue of her body, as tenants in common, if more than one; but, in default of such issue, or, being such, if they should all die under the age of 21, and without leaving lawful issue, then over. The niece suffered a recovery, and levied a fine, and died without ever having had any issue. It was argued, that the word issue meant children, on account of the super-added words, and because the testator considered that the issue of the niece might all die, and yet leave issue. And it was held accordingly; and that the limitations subsequent to that to the niece, were all contingent; and the particular state of freehold by which they were supported, having been destroyed before they were capable of taking effect, they were also destroyed with it. Lord Kenyon, C. J., said, that it was a contingency with a double aspect, like *Lodington v. Kime*; if the niece had any children, the estate was limited to them in fee; if she had no children, or if she had any, and they all died under 21, and without leaving issue, then, it was to go over. See § 766. 30. *Doe d. Dany v. Burnell*, 6 D. & E.

So where a testator devised to A., and to the issue of his body, his, her, or their heirs, equally to be divided, if more than one; and if A. should have no issue of his body living at the time of his decease, then over. It was considered, that A. took an estate for life; remainder to his unborn issue in fee, if he had any; and if their estate should not take effect, then over in fee. But it was not necessary to

decide this point: for, it was held, that *quæcunque vid data*, a recovery suffered by *A.*, before he had any issue, barred the limitations.

Merest v. James, 4 Moore, 327; of her body, lawfully begotten; and in default of issue, or S. C. 1 Brod. in case none of such issue lived to attain the age of 21 years, & Bing. 127. then over. The Court of Common Pleas certified, that the daughter took an estate for life only.

Observations It is to be observed, that the words "or in case none" &c., on *Merest v. James*, describing a failure of issue by death under 21, as a distinct event from that described by the preceding words, "and in default of issue," show that such preceding words did not mean an indefinite failure of issue: for, in that sense, they would have included the failure of issue afterwards described as a distinct event, but meant in default of children, in the event of no children being born, and thereby made it evident, that, by the issue to whom the estate was expressly devised, the children of the daughter were intended.

Eces v. Mosley, 1 You. & Coll. 589. Again; a testator devised to his son, *H. J.*, for life; with remainder to his lawful issue, and their respective heirs, in such shares and proportions, and subject to such charges as *H. J.* should appoint; but, in case *H. J.* should not marry and have issue who should attain 21, then to his son *O.*, in fee. It was held, that *H. J.* took an estate for life; with remainder to his children, as tenants in common in fee. Alderson, B., in delivering the judgment of the Court, said "The word issue is used in different senses; either as including all descendants, in which case it is of course a word

See § 463-4. of limitation; or, as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense; and it therefore most frequently has the effect of giving an estate tail to the ancestor. It might even perhaps be conceded, that this is *prima facie* its meaning. But the authorities clearly show, that whatever be the *prima facie* meaning of the word "issue," it will yield to the intention of the testator, to be collected from the will; and that it requires a much less demonstrative context to show such intention, than the technical expression of heirs of the body would do." (1 You. & Coll. 609.) "Now, if issue be taken as a word of limitation, the word "heirs" would be first restrained to "heirs of the body," and then altogether rejected as unnecessary. The word "respective" could have no particular meaning annexed to it; and the apparent intention of the testator to give *H. J.* an estate for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated." (*Ib.* 610.)

In another case, *A.* devised residuary freehold, copyhold,

and leasehold estate, to his son and four daughters, and their lawful issue respectively, in tail general, with benefit of survivorship to and amongst their issue respectively, as tenants in common; provided always, that such issue should not have a vested interest until they attained 21, being sons, and being daughters, until they should attain that age, or be married; but, during the minority of the said issue, the trustees might, after the deaths of the testator's son and daughters, apply the whole of the interest of the presumptive share of each child, for his, her, or their maintenance, education, and advancement, and in case his son or daughters, or any or either of them, should die without leaving lawful issue, or with lawful issue, and such issue, being sons, should not attain 21, or, being daughters, should not attain that age or be married, then, the shares of them so dying to be for the benefit of the survivors and their issue, in the same manner as their original shares. The Court of Exchequer (in unison with the certificate of the Court of Common Pleas, except as to the accruing shares of the entirety,) certified, that the testator's children took estates for their respective lives in the freehold and copyhold lands, as tenants in common, with contingent remainders in their respective shares to their respective children, by purchase, as tenants in common, in tail, with cross remainders in tail between such children, in each respective share; with cross remainders over in the whole of each of such shares respectively, on failure of all the children of any son or daughter and their issue, to the survivors or survivor of them, the testator's son and daughters, and the children of such surviving son or daughter, in like manner as in the original share of such son or daughter; and that the testator's son and daughters took corresponding interests in the leaseholds. Lord Langdale, M. R., confirmed the certificate of the Court of Exchequer, adding, that the word "survivor" was to be construed "other."

Cureham v. Newland, 2 Beav. 145.

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And where a testator devised to his wife, for life only; remainder to his daughters *E.* and *S.*, to be equally divided between them; viz. the one moiety to *E.* and her heirs for ever, and the other moiety to *S.* during the term of her natural life; and, after her decease, to the issue of her body lawfully begotten, and their heirs for ever. *S.* had one child living at the time of the devise. It was held, that the children of *S.* took a fee, as purchasers. Lord Kenyon, C. J., in accordance with L. C. J. Wilmot's observations in *Roe v. Grew*, 2 Wils. 322, said, that, in a will, issue is either a word of purchase or of limitation, as will best answer the intention of the deviser, though in the case of a deed, it is universally taken as a word of purchase. In this case, the prior devise of the first moiety to the other daughter *E.* and

Doe d. Cooper v. Collis, 4 D. & E. 294. See also *Backhouse v. Wells*, 1 Eq. Ab. 184, stated, *Fearne*, 152; *Loddington v. Kime*, 1 Salk. 224, stated, *Fearne*, 152. Observations

on *Doe d. Cooper v. Colles*.

her heirs for ever, showed that the testator intended to make a distinction between the two daughters, by giving *E.* the absolute power over her moiety; and by restricting *S.* to a life estate, and securing the estate to her issue after her decease.

III. Trusts executory, created by marriage settlement.

See § 489, 494-5, 706, 710.

See § 520-527.

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See § 598.

III. But, in the case of an executory trust by marriage articles, in favour of a person in *esse*, and his issue, his children will take as purchasers, even in the absence of any indication that they should take by purchase: because, they are considered as purchasers for valuable consideration; and, in the case of an executory trust, the intent that the issue should take by purchase, can be effectuated without sacrificing the primary intent of admitting all the issue; for, the conveyance to be made in pursuance of the trust, can be so framed, that all the descendants shall take, before the estate can revert or go over. So that where it is agreed to limit lands in remainder to or for the issue of the tenant for life, a strict settlement will be directed to be made upon the first and other sons, in tail, remainder to the daughters, &c. (l)

IV. Trusts executory created by will.

IV. "In the case of an executory trust by will, in favour of a person in *esse*, and his issue, the children will take by purchase, if, on the whole, it appears most probable that the testator intended them to take in that manner. (m)

V. Where the two limitations are not both legal, or both equitable.

V. "Where the limitation to the ancestor, viewed by itself, would create a mere equitable estate, and the limitation to the issue a legal estate; or, *vice versa*; the issue will take by purchase, in the same manner as the heirs of the body, under similar circumstances. (n)

VI. Where the issue cannot take by purchase on account of the rule against perpetuities.

VI. "And if the issue cannot take by purchase, on account of the rule against perpetuities, the word issue will be construed a word of limitation, in cases where, but for that rule, it would be construed a word of purchase, according to the second of the foregoing rules in the present chapter. (o)

See § 706.

(l) *Hart v. Middlehurst*, 3 Atk. 371; and *Dod v. Dod*, Amb. Rep. 274; as stated, Fearn, 105—6.

(m) *Lord Glenorchy v. Bosville*, Cas. Temp. Talb. 3 M. 1733; as stated, Fearn, 116—7.

(n) See *Mogg v. Mogg*, 1 Meriv. 654 (as regards the devise of the lower Mark estate), stated § 705. See also § 401, 470.

(o) See *Mogg v. Mogg*, 1 Meriv. 654, stated § 705.

CHAPTER THE FOURTEENTH.

FOURTH EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, UNDER THE *CY PRES* DOCTRINE, WHERE REAL ESTATE IS DEVISED TO THE CHILDREN OF AN UNBORN CHILD.

534 ^aWHERE a testator devises an estate tail to a grandchild, by a child not yet born at the testator's death, to take by purchase; and he appears to have intended that all the issue of such unborn child should take, so far at least as the rules of descent will permit; the Courts, though obliged to sacrifice his minor intent that the grandchild, by such unborn child, should take by *purchase*, because it is contrary to the rule against perpetuities, will nevertheless, under the doctrine of approximation, or, as it is commonly called, the *cy pres* doctrine, give effect to his paramount intent, that all the issue of the unborn child should take, by giving an estate tail to such unborn child, so as to enable the grandchild to take derivatively through such unborn child, though it cannot be allowed to

535 take in the particular mode pointed out by the testator. (a) And ^bin the case of *Pitt v. Jackson*, this construction was adopted, though, in that case, the grandchildren by the daughter were intended to take concurrently, (b) which was of course essentially different from the devolution of the land under the estate tail, which the Court gave the daughter, under the doctrine of approximation.

(a) See Butler's note, Co. Litt. 271 b, (1) VII. 2. See also his note to *Fearne* 201, (g); and *Nichol v. Nichol*, 2 W. Blac. 1159, as there cited.

(b) 2 B. C. C. 51.

CHAPTER THE FIFTEENTH.

FIFTH EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT
REMAINDERS, UNDER THE *CY PRES* DOCTRINE, IN THE
CASE OF AN INTENDED PERPETUAL SUCCESSION OF LIFE
ESTATES.

I. Perpetual
succession of
life estates,
by way of
executory
trust, in fa-
vour of un-
born de-
scendants.
See § 706,
710.

I. * WHERE a testator attempts to create a perpe- 536
tual succession of life estates, by way of executory
trust, in favour of unborn children, and more remote de-
scendants, the children, when born, will take estates tail, (a)
under the *cy pres* doctrine or doctrine of approximation, in
order that the descendants of such unborn children, may
take derivatively through such children, as they cannot take
independently by purchase, on account of the rule against
perpetuities.

II. Perpetual
succession of
life estates in
favour of
children in
esse and
more remote
descendants.
See § 436.
See § 706,
710.

II. And where a testator attempts to create a 536a
perpetual succession of life estates in favour of
children in *esse* and more remote descendants, the children
will take estates tail under the *cy pres* doctrine, in order to
effectuate the apparent primary or paramount intent of ad-
mitting all the more remote descendants to take derivatively
through the children, as those among them who were un-
born children of persons not in *esse*, could not take inde-
pendently, by purchase, on account of the rule against per-
petuities.

Wollen v.
Andrews,
2 Bing. 126.

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A testator devised an estate to trustees, in trust to permit
the deviser's six children to receive one sixth part each of
the rents, during the terms of their natural lives; and, after
their respective deceases, then to permit all the children of
such of his sons or daughter so dying to receive the rents
of such share or shares of him, her, or them, so dying; and
so, in like manner, from children to children; and in case
any or either of his said children should die without leaving
issue, then, the rents belonging to such of his sons or daugh-
ter should be received by the survivor or survivors. It was
held that the six children took estates tail; because, (Best,
C. J., said,) the testator went on to attempt that which was
impossible—to give an estate for life to unborn grandchil-
dren; he is not allowed so to advance towards the creation
of a perpetuity: but the Court must do that which would
approach nearest to his intentions. But there were other

(a) See *Humberston v. Humberston*, 1 P. W. 332, as stated, Fearn, 503.

words (he added) which placed the matter out of doubt; namely, the gift over on failure of issue.

This decision, in order to be satisfactory, must be referred simply to the principle above laid down. For, an estate for life *may* be given to an unborn grandchild by a child in esse at the time; and the gift over on failure of issue was not a gift over on an indefinite failure of issue.

Observations on *Wollen v. Andrewes*. See § 711-718. See § 553-4.

In another case, a testator devised lands for the use of his three children, for their lives, in equal shares, and to the issue of their respective bodies, for their respective life only, in equal shares for ever; and, in case of the death of any or either of his said children, without issue, then, in trust for the survivors or survivor, in equal shares, for life only, or to their respective issues, in equal shares, for life only; and, in case there should be only one child then living, then, upon trust for such only child, for life only, and for the issue of such only child, for life only, in equal shares; and, if but one issue of such child, then, to such only child's issue, for life only; and the heir of his or her body for ever; with a limitation over, in case there should not be any lawful issue of such child, or the child of such child. Either child who should marry, was to have power to make a settlement, for the lives of the parties, and the lives of their issue, with remainder over in tail. By a codicil, he devised the same lands to his said three children, as tenants in common, for 99 years, if his children should so long live; remainder to trustees to preserve contingent remainders; and the uses expressed in the will, as far as the rules of law would permit, were to be carried into perfect execution. The Court of Common Pleas certified, that the three children took estates for 99 years, if they should so long live, as tenants in common; remainder to trustees to preserve contingent remainders; remainder to the three children, as tenants in common, in tail general; with cross remainders between them, in tail general.

Brooke v. Turner, 2 Bing. New Cases, 422.

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536b

III. But, where there is a single intent to create a limited number only of life estates in succession, number of not warranted by the rule against perpetuities, an estate tail will not be given to any of the persons intended to take such life estates.

III. Limited life estates.

A testator gave an estate to his son *F.*, during his natural life; and, after him, he gave it to his eldest or any other son after him, during his natural life; and, after them, to as many of his descendants, issue male, as should be heirs of his or their bodies, down to the tenth generation, during their natural lives. It was held, that *F.* took for life only, Lord Ellenborough, C. J., observing, that in *Robinson v. Robinson*, 1 Burr. 38; *Doe v. Applin*, 4 T. R. 82; *Doe d. Bean v. Halley*, 8 T. R. 5, expressions were used denoting

Seaward v. Willock, 5 East, 598.

an intention that the lands should continue in the descendants of the first taker as long as there were any, without specifying or marking what estates such descendants should take. That this case, however, was not a case of a particular and a general intent, but a case of a single intent to create a succession of estates not warranted by law.

Observation
on *Seaward*
v. *Willock*.

The restrictive words "down to the tenth generation," plainly distinguish this case from the preceding, and negative the existence of any primary or paramount intent to admit all the descendants.

CHAPTER THE SIXTEENTH.

SIXTH EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, UNDER THE CY-PRES DOCTRINE, WHERE THE WORD SON OR CHILD, IN A DEVISE OF AN ESTATE IN REMAINDER, IS CONSTRUED AS A WORD OF LIMITATION.

WHERE a testator devises in remainder to the unborn child of a prior taker, even though it be by the designation of eldest son, but he appears to have intended that all the issue of the prior taker should inherit, so far as the rules of descent will permit; in such case, to give effect to the paramount intent of admitting all the issue, the prior taker will have an estate tail, and the description eldest son, child, &c., will not be regarded as a *designatio personæ*, as pointing out a particular individual who is to take by way of contingent remainder, but as a *nomen collectivum*, and a word of limitation.

See § 436.

See § 403-4.

Doe d. Garrod v. Garrod, 2 Bar. & Adol. 87.

A testator being seised in fee of freehold land, and of copyhold intermixed with it, and descendible to the youngest son, devised the same in the following manner: As to my worldly estate I dispose thereof as follows: I give to my nephew *J. G.* all my lands, to have and to hold during his natural life, and to his son, if he has one; if not, to the eldest son of my nephew, *J. G.*, during his natural life, and to his son after him; if not, to the regular male heir of the *G.* family, as long as there is one of them in being; and if they should be all extinct, then to the regular heir of my nephew *T. F.*'s family. By a codicil, stating, that his nephew *J. G.* had then a son, he gave and bequeathed to him, after his father's decease, all his lands, both freehold and copyhold, and to his eldest son, if he had one; but if he had no son, then, to the next eldest regular male heir of the

G. family, as long as there should be one in being. It was held that *J. G.*'s son, John, took an estate tail; Lord Tenterden, C. J., observing, that as it was plainly not the intention of the testator that the estate should go over to the next heir male of the *G.* family, while issue male of John should remain, the greatest chance of effectuating the general intent was to hold that John took an estate tail. The consequence of this construction was, that the copyhold descended to the youngest son of John, instead of going to "the eldest," while the freehold would descend to the eldest. But His Lordship remarked that this was a mere consequence of law, and probably the testator never contemplated it, and perhaps never knew of the custom.

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Again; a testator devised his real estate to trustees and *Doe d. Jones* their heirs upon the following trusts: "to permit my daughter *v. Davies*, 4 ter not only to receive the rents and profits to her own use, Bar. & Adol. or to sell or mortgage any part, if occasion requires; but 43. also to settle on any husband she may take, the same, or any part thereof, for life, should he survive her. But should my daughter have a child, I devise it to the use of such child, from and after her decease, with a reasonable maintenance for the education &c. of such child in the meantime. Should none of these cases happen, I give and devise my real estate, from and after my daughter's decease, unto" &c. It was held that the word child, since the daughter had no child at the time, was not a *designatio personæ*, but comprehended a class; and that the daughter took an estate tail; because the testator had prefaced the gift by words showing that he contemplated the possibility of the estate going over to the remainder-man, in the event only of the daughter dying unmarried; and because the words introducing the gift in remainder, "should none of these cases happen," showed an intent that the estate should only go over on failure of the issue of the daughter.

CHAPTER THE SEVENTEENTH.

See Ch. XII.
See § 159-195.
See § 128-136.
See § 117-127a, 148-158.

CASES OF AN ESTATE TAIL, BY IMPLICATION SIMPLY, OR BOTH BY IMPLICATION AND BY ANALOGY TO THE RULE IN SHELLEY'S CASE, WITH A VESTED REMAINDER OVER, IN REAL PROPERTY, DISTINGUISHED FROM CASES OF A LIFE ESTATE, AND A CONTINGENT REMAINDER OVER, EITHER WITH OR WITHOUT AN ALTERNATIVE LIMITATION; OR OF A LIFE ESTATE, WITH A LIMITATION OVER OF A SPRINGING INTEREST; OR OF A FEE, WITH A CONDITIONAL LIMITATION OVER.

SECTION THE FIRST.

Rules for determining whether an Indefinite Failure of Issue is meant, or merely a Failure of Issue within a certain Time, in Cases of a Limitation over on a Failure of Issue.

I. In devises of real estate, before 1838, the words "die without issue," "die without leaving issue," "in default," or "on failure," or "for want of issue," were all held to import an indefinite failure of issue.
See § 563.
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II. But in bequests of personal estate, before

I. It will be perceived, from the cases stated in the following sections, that, as regards real estate, no distinction exists between the words "die without issue," and "die without leaving issue," and "in default," or "on failure," and "for want of issue;" but that all those expressions, in devises made before the year 1838, are construed, to import of themselves, an indefinite failure of issue.

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II. But, in the case of personal estate, bequeathed before the year 1838, while the words "die without issue," of themselves, are construed to import an indefinite failure of issue, "the words "die without leaving issue" are construed, in their natural and obvious sense, of dying without leaving issue living at the death of the person the failure of whose issue is spoken of, (a) because, the construing them to refer to an indefinite failure of issue, would not benefit the issue, in the case of personal estate, by implication in favour of the parent, in the same manner as that construction would, in the case of real estate. And this distinction between real and personal estate, as to the

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(a) *Atkinson v. Hutchinson*, 3 P. W. 258; *Read v. Snell*, 2 Atk. 642; and *Lamplsey v. Blower*, 3 Atk. 396; as stated, *Fearne*, 473. *Goodtitle d. Peake v. Pegden*, 2 D. and E. 720; *Porter v. Bradley*, 3 D. and E. 143; and *Roe d. Sheers v. Jeffery*, 7 D. and E. 569; as stated, *Fearne*, 474, note (s).

words die without leaving issue, is observed even where both kinds of property are limited over in the same words.

A testator devised real estate to his eldest son *S.*, and the heirs of his body; and, in case of his death, without leaving issue of his body, then over. The testator then bequeathed the residue of his personal estate to *S.*; and he directed, that in case *S.* should die without issue of his body, the residue should also go over. Lord Manners, C., held, that the bequest over of the residue was not too remote: for, by the word "also" the testator had made the bequest over of the residue to depend on the same event on which he had before limited his real estates, that is, on the death of the first taker without leaving issue. And hence, on the authority of *Forth v. Chapman*, the bequest was good.

In another case, a testator devised freehold and leasehold estates to *A.* and *B.*, as tenants in common, and the heirs of the body and bodies of the said *A.* and *B.*, as tenants in common; and if either of them should die without leaving issue, then, his share to the use of the survivor, and the heirs of his body; and in case both of them should die without issue of his or their body or bodies, then, to the use of *C.*, for life, &c. Lord Langdale, M. R., held, that the limitation to the survivor was good, on the authority of *Forth v. Chapman*; and that, by the word "issue," in the succeeding limitation, the testator intended such issue as were to take under the prior limitation; and that consequently the limitation over was not too remote.

540 III. Where property is devised to a person for life, and then to his "issue male and his heirs," and it is introduced by words of contingency referring to the event of there being any "issue male," and *primâ facie* importing a condition precedent; and there is a devise over in fee, in the exactly opposite event of the prior taker dying "without issue male;" it is evident, from the form and language of the limitations, that the words referring to a failure of issue male, refer to the non-existence of sons or a son; and that the devise to the issue male is a contingent remainder to the eldest or only son in fee; and the devise over is a concurrent contingent remainder, as regards the estate of the prior taker, and an alternative limitation, in regard to the limitation to the issue, to take effect merely as a substitute for that limitation, in the event of no son being born.

This rule is deduced from the case of *Loddington v. Kime*, where a testator devised to *A.*, for life, without impeachment of waste; and if he have issue male, then, to such issue male and his heirs for ever; and, if he die without issue male, then, to *B.* and his heirs for ever. (b)

(b) 1 Salk. 224; 1 Ld. Raym. 203; as stated, Fearn, 225.

1838, the words "die without leaving issue" were not so construed, though the other expressions were construed in that manner. See § 563. *Foley v. Irwin*, 2 B. & B. 435. *Radford v. Radford*, 1 Keen, 486.

III. Where the devise to the issue male is introduced by [272] words of contingency, and the limitation over is an alternative to take effect in the opposite event of there being no son. See § 128-136, 676-681.

IV. Where the devise is to the children of the prior taker, equally, and their heirs; with a limitation over in case he should die without issue, which is an alternative.

IV. And ^c where property is devised to a person for life, and, after his death, to his children, equally, and their heirs; with a limitation over in case he should die without issue; the words referring to a failure of his issue refer to the event of his having no children, so as to introduce an alternative limitation; instead of denoting an indefinite failure of issue, so as to show that, by heirs of the children, the testator meant heirs of the body, and thus introduce a remainder over after an estate tail in the children. (c)

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V. Where the devise is to the issue of the prior taker, and [273] their heirs; with a limitation over in case he should die without issue, or all such issue should die without issue; which is both an alternative and a remainder after an estate tail.—See § 128, 159, 668-9.

V. But ^d where property is devised to a person for life, and then to his issue and their heirs, and the issue would take by purchase under the second rule in the thirteenth chapter, if there were no devise over; and there is a devise over in case the prior taker should die without issue, or all such issue should die without issue; it is evident that the words referring to the prior taker's dying without issue refer to his dying without children; but that the words providing for the event of all such issue dying without issue, clearly show, that, by heirs of the issue, the testator meant heirs of the body; and consequently, that the children of the prior taker were intended to take an estate tail, instead of an estate in fee. (d) So that, in this case, there is a life estate, with a contingent remainder over in tail, followed by a limitation which is to take effect either as an alternative, if there should be no children, or as a remainder after an estate tail in the children, if there should be children, and there should afterwards be a failure of issue.

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VI. Words referring to a failure of such issue import an indefinite failure of issue, or not, according to the degree of comprehensiveness of the antecedent expressions.

VI. Words referring to a failure of "such issue," may either refer to an indefinite failure of such issue in general or of issue male or female, or not to an indefinite failure, according to the degree of comprehensiveness of the antecedent expressions, to which the restrictive words "such issue" refer. For,

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1. They do where such expressions comprise all the issue generally or male or female.—See § 570.

1. If the antecedent expressions, to which the words "such issue" refer, are sufficiently comprehensive to comprise all the issue in general, or all the issue male or female; then, the words "such issue" refer to an indefinite failure as much as the word issue when standing unrestricted.

(c) *Goodright d. Docking v. Dunkam*, Dougl. Rep. 251, or 3d ed. 264, as stated, Fearn, 375.

(d) *Doe d. Barnard v. Reason*, cited 3 Wils. 244; and Fearn, 379.

2. But if the antecedent expressions, to which the words "such issue" refer, comprise some only of the issue in general or of the issue male or female; then, the words "such issue" refer only to a failure of the particular issue before spoken of.

So that if land is devised to the sons, daughters, or children, in remainder, after a devise to their parent, and there is a limitation over, in default, or on failure, or for want of such issue, the words "in default of such issue" &c., do not refer to the issue generally of the prior taker, so as to raise an estate tail in him, by implication, but solely, of course, to the issue before described, that is, either solely to the sons, daughters, or children, or to them and their issue before described. Thus,

only of the issue generally or male or female. As where the devise is to the sons, daughters, or children, of the prior taker.

544 (1) 'Where the sons, daughters, or children, would take the fee, irrespectively of the limitation over in default of such issue, or a limitation of the same import; these words do not cut down the fee to an estate tail, but refer solely to the sons &c., and the limitation over is an alternative, to take effect in the event of no son, &c., being born. (f) (See § 128—136.)

A testator having a daughter and grand-daughter, both named *R.*, devised to his grand-daughter *R.*, for life; remainder to trustees to preserve contingent remainders; remainder to the use of the issue of the body of *R.*, in such parts, shares, and proportions, manner and form, as *R.* should appoint; and, in default of appointment, to the use of all the children of *R.* lawfully to be begotten, and their heirs, as tenants in common; and, in default of such issue, to the use of all the other children of his daughter *R.* to be begotten, and their heirs, as tenants in common; and, in default of such issue, to the use of his own right heirs. *R.*, the grand-daughter made no appointment. It was held that her only child took an estate in fee; Lord Ellenborough, C. J., observing, that the words "in default of such issue," referred to the "children" of *R.*, and not to their "heirs;" that the daughter might, under the words in such "manner and form," have appointed in fee to all or any of the children; so that no argument could be drawn from the power of appointment; and that, in the case of *Ives v. Legge*, the words were "in default thereof," which might well be referred to the word "heirs;" and that the case of *Lewis d. Ormond v. Warters* was not determined on the ground of the words "for want of such issue," being, in their ordinary and proper sense, referable to the word "heirs," but on this, that it

(1) Where they would take the fee, the limitation over in default of such issue, &c., is an alternative. *The King v. The Marquis of Stafford*, 7 East, 521.

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(f) *Doe d. Comberbach v. Perryn*, 3 Durn. & East, 484; as stated, *Fearn*, 876.

was clear the testator meant the first and other sons of his eldest son to take in succession.

(2) Where they would take life estates, such limitation over is a remainder capable of taking effect either as an alternative or as a remainder.

Goodright & Lloyd v. Jones, 4 Mau. & Sel. 88.

(2) Where the sons, daughters, or children, would take estates for life, irrespectively of the limitation over "in default of such issue," or a limitation of the same import; these words do not raise an estate tail, by implication in favour either of the parent, or of the sons, daughters, or children, but refer solely to the sons &c., themselves; and the limitation over is both an alternative and a remainder, or, at least, it is a remainder, capable of taking effect either as an alternative, in case there should be no son born, or as a remainder, on the decease of the sons &c., as the case may be. (See § 128, 159, 668—9.)

A testator devised to his daughter *E.*, for life; remainder to her first and other sons; and for want of such sons, to her daughters, equally, &c.; and, in default of such issue of *E.*, then, to his daughter *M.*, for life; remainder to her first and other sons; and, for want of such, to the daughters of *M.*, equally, &c.; and for want of all such issues, to his own right heirs. *E.* had a daughter. It was held, that it appeared from the ultimate limitation, that the words "in default of such issue," meant, if there should be no issue, or, being issue, if such issue should fail.

Foster v. Lord Romney, 11 East, 594.

In another case, a testator devised to his nephew, *T.*, for life; remainder to trustees &c.; remainder to all and every the son and sons of the body of *T.*, severally and successively; and, for default of such issue, the testator devised the estate to three other nephews in succession, and their sons respectively, in the same manner. *T.* had a son. It was held, that the nephews and their sons took life estates.

Hay v. Lord Coventry, 3 D. & E. 83.

And so where a testator devised to *A.*, for life; remainder to trustees &c.; remainder to her first and other sons in tail male; and, in default of such issue, to the use of the daughters of *A.*, lawfully issuing, as tenants in common; and in default of such issue, to his own right heirs. It was held that the only daughter of *A.* took an estate for life only; Lord Kenyon, C. J., observing, that if the word "such" had not been introduced, the Court might perhaps have said, that as issue is "*genus generalissimum*," it should include all the progeny. But that there the word "such" was relative, and restrained the words which accompanied it.

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(3) Where they would take estates tail, such limitation over is a remainder, capable of taking effect either

(3) Where the sons, daughters, or children, would take estates tail, irrespectively of the limitation over "in default" of such issue, or of a limitation of the same import; these words refer to the sons, daughters, or children, and their issue before described and inheritable under the entail; and the limitation over is both an alternative and a remainder, or, at least, it is a remainder, capable of taking effect either as an alternative, in case there should

be no son &c. born, or as a remainder, on the death of the as an alter- sons &c., and the extinction of issue inheritable under the native or as entail. (g) a remainder.

A testator devised to seven of his sisters, for life, share *Lady Dacre* and share alike; and, after the decease of any of them, her v. *Doe*, in share to go to her first and other sons in tail; and, in default Error, 6 D. of such sons, to and amongst her daughters &c. It was & E. 112. held, upon the whole will, that the daughters took an estate tail, notwithstanding the mere birth of a son.

In another case, a testator devised to *D. O.*, his eldest son, *Lewis d.* for life; remainder to trustees to preserve &c.; remainder *Ormond v.* to the first and other sons of *D. O.*, and their heirs; and, for *Waters*, 6 want of such issue, to his second son, *J. O.*, &c., with like East, 336. remainders to his first and other sons; and, for want of such issue, to the testator's own right heirs. It was held, that the first and other sons of *D. O.* took estates tail in succession; the words "such issue," referring to the word "heirs."

547 VII. Where the limitation over is on failure of VII. Where issue generally; but the testator, in another passage, the issue are refers to the same persons by the name of children, and referred to thereby explains, that by the word issue, he means children; by the name of course it is the same as if the limitation over were ex- of children, pressly on failure of children. and thereby explained to mean children.

A testator gave his bank stock to trustees, in trust for *F.* [277] *B.* for life; and his funded property to the same trustees, in *Ellis v. Sel-* trust for *W. R. E.*, for life; and, from and after his decease, by, 7 Sim. then, upon trust (should *W. R. E.* have issue of his body 352. See lawfully begotten, whether male or female) to apply the in- also *Shef-* terest for the maintenance and education of such issue, till *field v. Lord* 21, and then, to transfer the capital to them. And he di- *Orrery*, 3 rected the trustees, after the decease of *F. B.*, to pay the Atk. 282; as dividends of his bank stock to *W. R. E.*, for life; and, from stated, and after his decease, to apply the dividends and capital for *Fearne*, 471. the benefit of the children or child of *W. R. E.*, in such manner as he had directed respecting the funded property. And should *W. R. E.* die without issue male or female of his body lawfully begotten, then, in trust for certain other purposes. Sir L. Shadwell, V. C., held, that the ultimate trust of the funded property and bank stock was not too remote, as the testator had himself interpreted issue to mean "child or children."

548 VIII. Where the whole of a fund is given to the VIII. Where same persons, and the limitation over of one the issue are moiety is explained, in the manner mentioned in the last so referred to

(g) But see *Keene v. Pinnock*, cited 3 Durn. & East, 495; and 3 Fearne, 379, contra.

in the limitation of one moiety, but not in the limitation of another moiety.

See § 563.

Carter v. Bentall, 2 Beav. 551.

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Kirkpatrick v. Kirkpatrick, 13 Ves. 476.

See § 549, 553.

proposition, to be intended to take effect on failure of children, instead of an indefinite failure of issue, but the limitation over of the other moiety, on failure of issue of the prior taker, or on his decease without issue, is not so explained; the limitation over of the latter, it seems, will (except in cases governed by the stat. 1 Vict. c. 26, s. 29) be construed to be intended to take effect on an indefinite failure of issue, though there may appear to be no reason for supposing but that both moieties were intended to go over in the same event.

A testator gave the undisposed of income of his personal estate, and the rents of his real and leasehold estates, to his daughter, for life; and, after the decease of his wife and daughter, he gave the residue of his real and personal estate to trustees, upon trust to sell, and pay one moiety of the produce to the issue of his daughter, equally between them, to be paid at 21; and if only one child, then to such one child; and, in default of such issue, he gave the said moiety unto and amongst all his nephews and nieces who should be living at the decease of his daughter. And, as to the other moiety, after the decease of his wife and his daughter, without issue, the testator gave the same to his trustees, in trust as therein mentioned. Lord Langdale, M. R., held that the gift over of the first moiety was not too remote, as the use which the testator had made of the words "only one child," and "such only child," showed, that, by the word "issue" in this clause, he meant "children;" and that construction was strengthened by other expressions. But His Lordship held, that the gift over of the other moiety was too remote: for, as the testator had made a distinct gift to the issue, and had explained "issue" to mean children in the first clause; whereas he had done neither in the second; the Court could not, upon any safe principles, imply the gift to issue or children, where it was omitted, or give to the word issue the meaning of "children," without an explanatory context, or any reference to a prior limitation.

In a case, however, where a testator gave to each of his two illegitimate sons, a sum of money; but, in the event of the death of either of them, before 21, and without issue, his share to go to the survivor; but, in the event of both dying without issue, then over; Lord Erskine, C., held, that the ultimate limitation was not too remote: for, on the authority of *Sheppard v. Lessingham*, Amb. 122, and other cases, if a preceding limitation over is made to depend on a dying without leaving issue living at the death of the person dying, the same construction is to be given to the words "dying without issue" generally, on which a subsequent limitation is made to depend, the intention appearing the same, though the limitations are differently expressed for the sake of brevity.

549 IX. Where property is devised^(*) or bequeathed⁽ⁱ⁾ to a person indefinitely or otherwise, with a limitation over, if he dies under a certain age without issue; the words importing a dying without issue, evidently refer to a failure of issue at his death, instead of denoting an indefinite failure of issue. [279]

IX. Where property is limited to a person over on death under a certain age, without issue.

A testatrix devised to her grand-children, as tenants in common; but, in case of the death of either of them, under age, and without leaving issue, then over. It was held that the testatrix could not have contemplated an indefinite failure of issue at any remote period; because, she only looked to a period while her grand-children were under age. And that, on the authority of *Frogmorton v. Holyday*, 3 Burr. 1618, and *Doe v. Cundall*, 9 East, 400, the grand-children took the fee, with executory devises over, if any of them died under 21, and without leaving lawful issue living at the time of their respective deaths. *Toovey v. Bassett*, 10 East, 460.

550 X. We have already seen that where a testator devises over an estate in case the prior taker should die under a certain age, or without issue, or in case he should die within any other limited period, or without issue; the word *or* is construed *and*, so that the failure of issue is held to be a failure of issue living at his death. (§ 235—240.)

X. Where a devise over is on death within a limited period, or without issue, and *or* is construed *and*.

551 XI. And the words importing a failure of issue, are construed to refer to a failure of issue at death, where the devise over is in case the prior taker should not live to attain a certain age, or should live to attain such age, and should afterwards die without issue.^(k) These words do not denote an indefinite failure of issue so as to raise an estate tail by implication; because, there is no apparent intention that the issue should take in the event of his having issue, but dying under 21.

XI. Where a devise over is on the prior taker's death under a certain age, or on his subsequent death without issue.

552 XII. And where property is devised to a person and his heirs, with a devise over if he should die without leaving issue, or having such issue, such issue should die under 21, without issue; it will appear, from the ninth of the foregoing rules, that the failure of issue which is meant, is a failure of issue of the children of the prior taker, at the death of such children, under age; so that the limitation over, instead of being a remainder after an estate tail, or an executory limitation void for remoteness, is good as a

XII. Where a devise over is in the event of death without leaving issue; or having such

(*) *Thrustout d. Small v. Denby*, 1 Wils. 270; as stated, *Fearne*, 401, 470.

(i) See *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; stated § 548.

(k) *Glover v. Monckton*, 8 Bing. 15, as cited, 2 Jarman's *Powell on Dev.* 573.

issue, of such conditional limitation, by way of executory devise, to take issue dying effect, at the furthest, within a life in being and 21 years under a cer- from the death of the testator. tain age without issue.—See § 148-9, 706.

Beachcroft v. Broome, 4 D. & E. 441. A testator devised an estate to *A.* and his heirs, &c., for ever; and, if he should die without having settled or disposed of it, or without leaving issue of his body, or having such issue, such issue should die under 21 without issue, and his son *W.* should then be dead, without issue; then, over. Lord Kenyon, C. J., said, that he should have thought it extremely clear that the limitation over might have taken effect as an executory devise.

XIII. Where a bequest over is to the survivor, without words of limitation. XIII. If 'personal estate is given to two or 553 more persons for life, with a limitation over to the survivor or survivors, (simply, without adding the words, executors, administrators, and assigns,) in case of the death of any or either of such persons without issue; the presumption, *prima facie*, is, that the word survivors is used in the plain and obvious sense, as meaning such of those persons as should be living when any of them happened to die, and not as simply equivalent to the word "others;" and that the testator did not refer to an indefinite failure of issue; but that he referred to the dying of any of them without issue living at their death.(l)

XIV. Where a bequest over is to the survivor, with words of limitation. XIV. But "where the words executors or ad- 555 ministrators, are added to the word survivor, that word furnishes no such presumption that a failure of issue at death was contemplated.(m)

[281] A testator charged his real estate with two legacies, in favour of *E. P.* and *V. P.*; and, in case *E. P.* or *V. P.* should die without issue, then, the whole of the two legacies was to be paid to the survivor, his or her executors, administrators, or assigns. *E. P.* died without issue, in the testator's lifetime. Sir W. Grant, M. R., held, that the bequest over was too remote; and therefore, that the legacy had lapsed. His Honour observed, that a bequest to *A.*, after the death of *B.*, did not import that *A.* must himself live to receive the legacy, but that the interest vested at the death of the testator, and was transmissible to *A.*'s representatives, who would take whenever *B.* died; and that, for a similar reason, a bequest to *A.*, in case *B.* should die without issue, was void for remoteness. That it was otherwise, however,

(l) *Ranelagh v. Ranelagh*, 2 M. & K. 441. See also *Massey v. Hudson*, 2 Meriv. 130, stated § 555. *Hughes v. Sayer*, 1 P. W. 534; as stated *Fearne*, 472.

(m) But see *Nichols v. Skinner*, Chanc. Prec. 528; as stated, *Fearne*, 472.

with a bequest over to the survivor of two persons; for, there, *prima facie*, it would be presumed that the survivor was meant personally to enjoy the legacy. But that the addition of the words executors, &c. excluded that presumption.

556 XV. *Where a testator bequeathed personal estate to his two daughters, and directed, that upon the demise of either of them, without issue, the share of her so dying should go to her sister, without adding the words, and to her executors, &c.; the limitation over was construed as if it were a limitation to the "survivor;" (n) because the dying of one without issue, seemed to mean a dying without issue in the lifetime of the other.

557 XVI. *Where the words introducing a limitation over of personal estate, put the case of the prior taker's dying without issue indefinitely, but the testator in limiting it over, adds that then after his (the prior taker's) decease, the property shall go over; in such case the failure of the issue is construed to be a failure of issue at the prior taker's decease. (o)

XVII. *And it has been held, that where a testator devises to a person for life, and no longer, and after his decease to such of that person's issue as he should by will appoint; and in case he should die without issue, then over, the failure of issue which is meant, is a failure of issue at his death; because, it is to be intended such issue as he should or might appoint to. (p)

559 XVIII. Where land is devised to a person and his heirs, with a limitation over on failure of issue, and all the ulterior limitations dependent upon the failure of issue, are for life only; the failure of issue is construed to mean a failure of issue at the death of the prior taker, the person whose issue is spoken of; because it is not likely, in such case, that the testator was contemplating an indefinite failure of issue, as that might, and most probably would not happen until very many years after the death of the objects of the ulterior limitations. But it is otherwise where some only of the ulterior limitations are for life.

In *Barlow v. Salter*, Sir W. Grant, M. R., said, "Where nothing but a life interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life. But where the entire interest is given over, the mere circumstance that one taker is confined to a life interest, furnishes no indication of an intention to make the whole

XV. Where property is bequeathed to two sisters, with a limitation over, on the death of one without issue, to her sister.

XVI. Where it is directed that property shall go over after the prior taker's decease.

[282] XVII. Where a limitation over is preceded by a bequest to such of the prior taker's issue as he shall appoint to.

XVIII. Where all the ulterior limitations are for life only.

Barlow v. Salter, 17 Ves. 483. See also *Doe v. Jones v. Owens*, 1 B. & Ad. 318;

(*) *Mackinnon v. Peach*, 2 Keen, 555. But see *Green v. Rod*, Fitzgibb, 68; as stated, Fearn, 481. And see Fearn, 483.

(o) *Pinbury v. Elkin*, 1 P. W. 563; as stated, Fearn, 473.

(p) *Target v. Gaunt*, 1 P. W. 432; as stated, Fearn, 472.

stated § 568. bequest depend on the existence of that person at the time when the event happens on which the limitation over is to take effect." And this latter point was decided by the same learned Judge in the case of *Boehm v. Clarke*,
 And see *Fearne*, 488.
 9.

Boehm v. Clarke, 9 Ves. 580.

XIX. Where the devise over is for payment of [283] debts. XIX. "The same construction is adopted, where, 560 on failure of issue, the property is devised in trust for payment of debts(*q*); because, it could not be supposed that the testator would provide for the payment of debts, on an indefinite failure of issue, which might not happen for two or three hundred years.

XX. Where the estate is subject to the payment of a sum to be disposed of by the will of the prior taker. XX. Where property is devised to a person and 561 his heirs, with a limitation over of the same on failure of his issue, subject to the payment of a sum of money, to be disposed of by his will; such failure of issue is construed to be a failure of issue at his death.

A testatrix devised to *M. H.* and her heirs for ever; and, in case *M. H.* should die, and leave no child or children, then, she devised to *J. B.* and her heirs for ever, paying 1000*l.* to the executors of *M. H.*, or to such person as she should by will direct. It was held that "child or children," meant issue; but yet that *M. H.* took a fee, with an executory devise over, which was not too remote; for the payment being a personal provision, and to be made to a person or persons appointed by *M. H.*, the event contemplated seemed to be a failure of issue at *M. H.*'s death, and not an indefinite failure at any remote period.

Doe d. King v. Frost, 3 Bar. & Ald. 546. In another case, a testator having an only son, and also a daughter who had several children, devised to his son, *W. F.*, and his heirs for ever, all his lands &c.; and, if *W. F.* should have no children, child, or issue, the estate was, on the decease of *W. F.*, to become the property of the heir at law, subject to such legacies as *W. F.* might leave by will to any of the younger branches of the family. It was held, that *W. F.* took a fee, with an executory devise over, in the event of his dying without leaving any children living at his decease; because, the testator spoke of the estate going over "on the decease of *W. F.*;" and it would have been necessary to have given him the power of charging the estate with legacies, if the will had given him an estate tail, with the reversion in fee to him as heir at law.

XXI. Where a term for raising legacies is limited of such issue as are included in those limitations, but the XXI. Where limitations in tail do not extend to 562 all the descendants of a devisee, and a term created for the sole purpose of raising legacies, is limited in default

(*q*) See *French v. Caddell*, 6 Bro. Par. Ca. 58; and *Wellington v. Wellington*, 4 Burr. 2165; as stated, *Fearne* 469, note (*b*.)

legacies are not given till a failure of issue generally; it will be presumed, that the legacies were intended to be given on the same event on which the term is to arise; and that, the failure of issue on which the legacies are given, refers to the failure of such issue as are inheritable under the prior limitations.

A testatrix, having an absolute power of appointment over the reversion in fee simple of certain lands, devised the reversion to *A.* for life; remainder to *A.*'s first and other sons, in tail male; remainder to *A.*'s daughter, in tail general; with cross remainders between them in tail; with remainder, in default of all such issue, to trustees, for the term of 1000 years, to raise and pay such legacies as she should thereafter give. And, in a subsequent part of the will, she bequeathed, from and after the decease and failure of issue of *A.*, certain legacies, the better to secure the payment of which, she charged them on the reversion she had before devised. In this case, there was no limitation to carry the estate to the female issue of the sons; and, although the term was limited "in default of all *such* issue," that is, such issue as were inheritable under the prior limitations, yet the legacies were not given till after "the failure of issue of *A.*" generally; and, as there might be female issue of the sons, the bequest might not be capable of taking effect until some time after failure of the issue inheritable under the prior limitations; so that, in fact, the bequest appeared to depend upon an indefinite failure of issue of *A.*, unsupported by any express limitations co-extensive with the existence of the issue of *A.*, and consequently seemed to be void, as being too remote. But Sir John Leach, V. C., held, that the legacies were well charged. And this decision was affirmed by Lord Eldon.

on the expiration of an estate tail, and the legacies are held to be given on the same event.

Morse v. Lord Ormonde, 1 Russ. 382.

563 XXII. Certain words which, in a will made before 1838, imported, or were construed to import, an indefinite failure of issue, will now, when they occur in a will made since the beginning of that year, be construed to mean a failure of issue at or before the death of the person whose issue is referred to. For, by the stat. 1 Vict. c. 26, s. 29, it is enacted, "that in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person; and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from

XXII. Enactment of stat. 1 Vict. c. 26, s. 29.

such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

SECTION THE SECOND.

Cases of a Limitation over on an Indefinite Failure of Issue of a Prior Taker, where there is no Express Devise to his Issue.

Rule of construction. WHERE a testator, after devising real-estate to one person, without any express devise to the issue of such person, makes a devise over to another on an indefinite failure of issue male or female, or issue in general, of the prior taker; in such case, the prior taker has an estate tail by implication, with a remainder over to the other person. 564

The principle of this construction. This construction is adopted in order to effectuate the indirectly declared intent that the estate should not go over till an indefinite failure of issue male or female, or issue in general, of the prior taker. 564a

Two co-existing yet inconsistent intents; namely, the primary or paramount intent, and [286] the secondary or minor intent, which For, as in the cases comprised in the thirteenth chapter, so also in those falling within the scope of the present chapter, where there is a limitation over on an indefinite failure of the issue of a prior taker, there are generally two co-existing yet inconsistent intents, of the same kind as those which exist in the cases treated of in the thirteenth chapter; the one of which, namely, the secondary or minor intent, is sacrificed, in order to give effect to the other, namely, the primary or paramount intent. (See § 520—2.) 564b

How the primary or paramount intent is manifested. Compare § 523-4. This primary or paramount intent, in the cases treated of in the present chapter, is expressed or necessarily implied in the limitation over on an indefinite failure of issue of the prior taker, which amounts to a declaration of an intent that the estate should not go over from the prior taker or takers, till an indefinite failure of issue of the person whose failure of issue is spoken of. 564c

This construction is adopted where the prior limitation is in fee, This construction is adopted, as well where the prior limitation is in words which would pass a fee, as where it is indefinite, or expressly for life. 564d

For, where the prior limitation is to the ancestor and his heirs, it is only necessary to interpret heirs to mean heirs of the body, disregarding the word assigns as 565

mere surplusage, where it is added. Where the or indefinite, prior limitation is indefinite, the raising an estate or for life. 566 tail by implication, virtually supplies the want of words of limitation, in the devise to the ancestor. See § 404. 567 And where the prior limitation is expressly for life, the raising an estate tail by implication, merely amounts at most to a sacrifice of a secondary or minor intent for the purpose of effectuating the primary or 568 paramount intent of the testator. And, in all these cases, it gives effect to the general rule, that a See § 196-9. limitation shall, if possible, be construed as a remainder, rather than as an executory devise. And it prevents the intention of the testator from being entirely frustrated: for, See § 117- if the limitation over were construed an executory devise, 127a, 148- whether it were a limitation of a springing interest or a 158, 706, conditional limitation, it would be void for remoteness: and 714. the maxim is, *Ut magis valeat quam pereat*.

A testator devised the rents and profits of his freehold and leasehold estate to his executors, until his daughters should attain 21, in trust to improve the same, for the advantage and education of his daughters; and, as to the freehold and inheritance, he devised the same to his daughters when and as they should attain 21, equally between them, and their heirs, as tenants in common: provided that if both his daughters should die without lawful issue, then, over. It was held that the daughters took an estate tail.

And where a testator devised to his nephew; but, if he should die without male heir, then, over; it was held an estate tail in the nephew by implication. [287]

Again; a testator, after confirming his wife's settlement of part of his estate, devised the rest to his daughter and only child, and her heirs; and he devised that part settled on his wife, to his daughter, after the death of his wife; and, in case his daughter should die without issue, he gave her a power of appointment over the whole; and, for want of such issue and appointment, then, the same should go to his own right heirs. It was held, that the daughter took an estate tail.

So where a testator devised a messuage to his son, *I*, his heirs and assigns for ever; but, in case *I*. should die without issue; then, he devised the same to the child with which his wife was *enccinte*, his or her heirs and assigns for ever. It was argued that *I*. took a fee, determinable in the event of his dying without leaving issue; and the word "assigns," and the word "then" were relied upon in support of that construction. But the Court held, that *I*. took an estate tail, according to *Brice v. Smith*, 1 Willes, and the cases there cited. See also *Roe v. Scott* and *Smart*, as stated, *Fearne*, 473, note (s).

So where a testator devised to his son and his right heirs for ever, a certain house &c., and also nine closes; which

Agar, 12
East, 252.

closes, he thereby gave to his son and his heirs for ever, upon this condition only, that he should pay to his daughter 12*l.* a year till she attained 21, and, after that age, pay her 300*l.*; and, for default of payment, she should enter and enjoy the closes, to her and her heirs for ever; and in case his son and daughter should both die without leaving any child or issue, then over. It was held, that the son took an estate tail, and the daughter an estate tail in remainder, with a remainder over; such being plainly the intention; and it being a rule, that if a devise over can take effect as a remainder, it shall not be taken to be an executory devise.

Romilly v.
James, 6
Taunt. 263.

And where a testator devised to his brother *H. S.*, all his real estates, subject to the several devises in his will afterwards mentioned. The testator then devised to his brother's son, *H. S.*, the younger, a certain estate; adding, at the conclusion of his will, that in case *H. S.* and *H. S.* the younger should happen to die, having no issue of either of their bodies, then, he devised all his real estate to *I. C.* and his heirs. It was held, that the last clause cut down the estates of *H. S.* and *H. S.* the younger to estates tail; and that *H. S.* the younger took an estate tail, with remainder in tail to *H. S.*, remainder in fee to *I. C.*

[288.]

Dansey v.
Griffiths, 4
Mau. & Sel.
61.

So where a testator devised to his eldest son, *R. D.*, and his heirs for ever, all his manors &c., and personal estate; but, if *R. D.* should die, and leave no issue, then, he gave all his aforesaid manors and estates unto his son, *W. D.*, and his heirs; and, if he should die without issue, then, to his son, *E. C. D.*; and in the like case, to his son, *G. H. D.*, and in like case to his son, *I. D.*; and, in failure of issue from him, &c. The Court of King's Bench certified, that *R. D.* took an estate tail.

Doed. Jones
v. Owens, 1
B. & Ad.
318.

And where a testator gave his real estate to his wife, for her life; and then, to be relinquished to his son *B.* at her decease. And he directed, that if *B.* should die without issue, that his real estate should go equally between his daughters, *M.* and *S.*, for the life of *M.*, and at her death, the whole to *S.* and her heirs. The testator also directed that if *B.* should survive his mother, he should pay *S.* 5*l.* within twelve months after his mother's decease. It was

See § 559.

held, that *B.* took an estate tail, with a remainder over. Bailey, J., observing, that if life estates only had been devised over, *Roe v. Jeffery* might have applied, and the terms "die without issue," might have been confined to a failure of issue at *B.*'s death, that is, if no distinction were to be insisted upon between "dying without issue," and "leaving no issue." But, in the present case, the inheritance was given to *S.*, and would have passed, though *M.* had died in the lifetime of *B.*

And so where a testator devised lands to trustees and *Doe d. Ca-* their heirs, in trust to apply the rents to the maintenance of *dogan v. I.*, until she should attain the age of 25, and afterwards in *Ewart, 7* trust for *I.* and her heirs; but, in case it should happen that *Ad. & El.* *I.* should depart this life without leaving issue, then he de- 636. vised the lands to *W.* and *D.* in fee. There were divers trusts which rendered it necessary that the trustees should take the legal estate in fee. And the Court held, that *I.*, [289] who died under 25, after suffering a recovery, in which the trustees did not join, took a vested equitable estate tail; and that *W.* and *D.* took equitable remainders; and that such equitable remainders were barred by the equitable recovery suffered by *I.*

And again, where a testator devised lands to his son, *J.*, *Machell v.* for life; but if *J.* should die without issue, not leaving any *Weeding, 8* children, then, he directed that the lands should be sold, and *Sim. 4.* the proceeds divided amongst his three other sons; and if any of them should die before *J.*, then, that their shares should be divided among their children. Sir L. Shadwell, V. C., held, that *J.* took an estate tail, observing, that it is a settled point, that whether an estate be given in fee, or for life, or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail.

SECTION THE THIRD.

Cases of a Limitation over on an Indefinite Failure of Issue of a Prior Taker, where there is an Express Devise to his Issue, eo nomine.

569 I. WHERE there is an express devise to the I. Where the issue in general, or issue male or female, *eo nomine*, ancestor interposed between the prior devise to the ancestor and the takes an es- subsequent devise over on an indefinite failure of his issue tate tail in in general or issue of the given description; and the word possession. issue, in the intermediate devise, would, according to the first rule in the thirteenth chapter, be construed a word of limitation, if there were no such devise over; of course the addition of such devise over does not prevent the word issue from being construed as a word of limitation, but operates in aid of that construction; so that the ancestor takes an estate tail in possession, as well under the first rule in the thirteenth chapter, by analogy to the Rule in *Shelley's Case*, and under the *cy pres* doctrine, as by implication arising from the devise over on an indefinite failure of his issue.

A testatrix devised an estate to her grandson and the *Franklin v.* issue of his body, and to the heirs of such issue for ever; 258. *Lay, 6 Mad.* but, if her said grandson should die without leaving any' [290]

issue of his body, then, she devised the estate to her nephew and his heirs for ever. The grandson insisted that he took an estate tail; but the defendant contended, that the words "leaving issue," were to be construed as leaving issue living at his death. Sir John Leach, V. C., held, that "leaving issue," as applied to real estate, imported a general failure of issue, and brought the case within the authorities cited by the plaintiff, and that the whole will might be reconciled by construing the words "heirs of such issue," as heirs of the body.

Murthwaite v. Barnard, 2 Brod. & Bing. 623. S. C. nom. *Murthwaite v. Jenkinson*, 2 Bar. & Cres. 359.

In another case, a testator devised to his three nieces, equally to be divided between them, share and share alike, for the term of their respective lives; and, after their decease, he desired, that the lawful issue of them and each of them should have his or her mother's share for life, in like manner; and that, if either of his nieces should die in the lifetime of the others or other of them, without issue, that her share should be shared by the survivors, for their lives, and afterwards by their issue. And, if all his nieces, save one, should die without issue, then, he declared his will to be, that such surviving niece should have the whole, for the term of her life; and, from and after her decease, that her issue should have the whole, to hold the freehold part to them, their heirs and assigns, as tenants in common, and, if but one, to such only one, his or her heirs and assigns. And if all his nieces should die without issue, then over. The Court of Common Pleas certified, that the nieces took estates for life, with cross remainders between them, for life, in the event of one or two of them dying without issue; and that *G. B.*, son of one of the nieces, took an estate tail in remainder in his brother's third part, subject to be divested in part by the birth of other children of his mother; and that he would have an estate tail, in the whole, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born. But the Court of King's Bench certified, that the nieces took estates tail.

It is immaterial, in the [291] supposed case, whether the expression in the devise over is "issue," or "such issue."

In the case supposed in the preceding rule, it is 570 immaterial whether the expression, in the devise over, is, "issue," indefinitely, or "such issue;" because the word issue in the intermediate devise, in the supposed case, being construed a word of limitation, and therefore embracing all the descendants generally, or of the given description, *in infinitum*, a failure of "such issue," is tantamount to a failure of "issue" indefinitely. (See § 543.)

Denn d. Webb v.

A testator devised to *N. W.*, for life, without impeachment of waste; and, after his decease, to the issue male of his

body lawfully begotten, and to the heirs and assigns of such issue male for ever; and, for default of such issue male, then over. *N. W.* suffered a recovery before he had any issue. It was held, that *N. W.* took an estate tail. Lord Kenyon, C. J., observed, that nothing could be clearer than that the first intention of the devisor, was, to give only a life estate to *N. W.*, but that his general intention was, that the male descendants of *N. W.* should take the estate, and that none of those to whom the subsequent limitations were given, should take, until all the male descendants of *N. W.* were extinct; and that general intention would be best answered by deciding, that *N. W.* took an estate tail. For, if he took an estate for life, it would be difficult to extend the estate to the issue, to more than one son; and he conceived that the eldest must have taken the absolute interest in the estate. But that would defeat the devisor's intention; because, if it descended to that one son, and he had died without making any disposition of it, it would have gone to the other grandsons of the devisor, the persons interested under the subsequent limitations. But that, even if these words comprehended all the male issue as tenants in common in tail, that would not have answered the devisor's intention; because there were no words to create cross remainders between them. The Court, however, held, that even if *N. W.* were tenant for life, with a contingent remainder in fee to his children, if he had any, and, if he had none, then a contingent remainder over; still, all the limitations over were destroyed by the recovery which destroyed the particular estate.

Where a testator devised to *A.* for life; without impeachment of waste, and with a power of jointuring; and, from and after his decease, then, to the use of the issue male of his body and their heirs; and in default of such issue, over. It was held, that *A.* took an estate tail, according to *Roe v. Grew*, 2 Wils. 322. [292]

Another case may be noticed in this place, in which a testator devised to his wife, for life; and after her decease, that the estate should be settled by able counsel, and go to and amongst his grandchildren of the male kind, and their issue in tail male; and, for want of such issue, upon his female grandchildren. Sir Thomas Plumer, V. C., held, on the authority of *Blackburn v. Stables*, and *Dodson v. Grew*, 2 Wils. 322, that a grandchild of the testator took an estate tail male; though His Honor admitted, that this was an executory trust; and that the Court, in executing such a trust, does not adhere to the formal words used by the testator, but will modify them so as to effectuate the real intent.

Puckey, 5 Durn. & East, 299.

Frank v. Stovin, 3 East, 548.
[292]
See also *Roe v. Dodson*
v. Grew, 2 Wils. 322; as stated, *Fearne*, 192; and *King v. Burchell*, Amb. 379; as stated and commented on, *Fearne*, 363-4.
Marshall v. Bousfield, 2 Mad. 166.

II. Where (upon principle) the ancestor would take an estate tail in remainder. II. Where there is an express devise to the issue in general, or issue male or female, *eo nomine*, indefinitely, or for life, or in tail, interposed between the prior devise to the ancestor and the subsequent devise over on an indefinite failure of his issue in general or issue of the given description; and the word *issue*, in the intermediate devise, would, according to the second rule in the thirteenth chapter, be construed a word of purchase, if there were no such devise over; the better opinion upon principle, though not upon authority, would clearly seem to be, that the addition of the devise over, does not prevent the word *issue* from being construed a word of purchase, and the intermediate devise from conferring a distinct estate upon the issue, unless the object of the intermediate devise is to create a perpetual succession of life estates; but yet, that it raises an estate tail, by implication, in favour of the ancestor, to take effect in remainder after the intermediate estate conferred upon the issue. 571

See § 583. Such would seem to be the better opinion upon principle; because it would appear perfectly absurd to hold that the addition of the devise over, by the mere force of implication, has the effect of annihilating an express intermediate devise, which, but for such devise over, would confer a distinct estate on the issue, and to maintain that the devise over has such an effect, although, by a different construction adopted in analogous cases, full effect could be given to it in another way, which would completely accomplish the primary or paramount intent, denoted by it, of admitting all the issue, and yet without sacrificing the secondary or minor intent, of giving the immediate issue an estate by purchase. 572

Absurdity of contrary doctrine. [293] See § 564a-564c. There are indeed decisions which support this doctrine to some extent; but probably these cases would have been differently decided, if the construction above mentioned, and the decisions bearing by analogy upon the point, had been suggested and sufficiently urged upon the Court. And experience has shown, as a learned author observes with respect to another question, "that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle." (a) 573

Observations on the fact that there are decisions in support of the contrary doctrine. *Doe d. Blandford v. Applin*, 4 D. & E. 82, held, in order to effectuate the general intent, that *W. D.* took an estate tail. This case has been sometimes considered as showing that words of distributive modification do not 573

Doe d. Blandford v. Applin, 4 D. & E. 82, held, in order to effectuate the general intent, that *W. D.* took an estate tail. This case has been sometimes considered as showing that words of distributive modification do not

(a) 2 Jarman's Powell on Devises, 738.

prevent the parent from taking an estate tail in possession, but may be rejected as repugnant. And in support of this view, it may indeed be urged, that Buller, J., remarked, that that construction rendered it necessary to reject the words, "and amongst." But, setting aside the probability that these words were merely added by mistake, *currente calamo*, it does not seem at all necessary to reject them: for, they may fairly be considered as referring, not to a tenancy in common, or a joint tenancy, but merely to the case of two or more coheireses or their representatives.

And in another case a testator devised a messuage to *R. Doe* d. *Cock C.*, for the term only of his natural life; and, after his de- v. *Cooper*, 1
cease, to the lawful issue of *R. C.*, as tenants in common; East, 229.
but, in case *R. C.* should die without leaving lawful issue, then and in such case, after his decease, he gave the same [294]
to *E. H.* It was held, on the authority of *Robinson v. Robinson*, 1 Burr. 38; *Roe* d. *Dodson* v. *Grew*, 2 Wils. 323; and *Doe* d. *Candler* v. *Smith*, 7 T. R. 531, that *R. C.* took an estate tail, on the ground, that it was the general intent that all his issue should inherit the entire estate, before it went over. In the argument, no notice seems to have been taken Observations
of the words, "then and in such case, after his decease," (b) on *Doe* d.
taken in connexion with the distinction which, in cases of *Cock* v.
personal estate, is drawn between the words "without *Cooper*.
issue," and the words "without leaving issue," which are See § 557,
the words used in this case. These several expressions seem 538-9.
clearly to show, that the limitation over to *E. H.* was to take effect, not on an indefinite failure of issue of *R. C.*, but in the event of his leaving no issue at his decease. And if so, they do not show that the intention was, that all the issue, i. e., all the descendants of *R. C.* should inherit the whole estate before it should go over, so as to raise an estate tail in *R. C.* by implication. And if, then, *R. C.* took a life estate only, according to the express terms of the will, followed by a devise to his issue, as purchasers, which, as being indefinite, only gave them a life estate; what is the nature of the limitation to *E. H.*? It is not a conditional limitation; See § 148-
because, it was not to cut short the preceding interest of the 159.
issue of *R. C.*, before it would expire according to the terms of its original limitation. It would clearly seem to be an See § 129-
alternative limitation: for, it would appear to be a devise of 136.
an estate for life to *R. C.*, followed by two concurrent contingent remainders; namely, if *R. C.* should leave any issue, then, to such issue as tenants in common; but if he should die without leaving any issue, then, to *E. H.* (c) But what-

(b) See *Doe* d. *King* v. *Frost*, as stated, § 561.

(c) See *Hockley* v. *Mawbey*, 1 Ves. 142; *Doe* d. *Davy* v. *Burnsall*, 6 D. & E. 30; and *Doe* d. *Gilman* v. *Elvey*, 4 East, 313; stated § 580.

[295] ever may have been the nature of the limitation to *E. H.*, it is conceived that if the words of the will above alluded to had been pressed on the Court, they would not have held that *R. C.* took an estate tail by implication: for surely it must appear that the alleged ground for such implication did not exist; or, even admitting that the words did denote an indefinite failure of issue, and consequently that there was ground for the implication of an estate tail, yet, that a distinct effect should have been given to the devise to the issue as tenants in common, and an estate tail raised by implication in *R. C.*, in remainder.

Ward v. Bevil, 1 You. & Jer. 512. However, the same construction was adopted, even where a testator devised a messuage to his son, during the term of his natural life; and, in case he should have issue, it was his will that they should jointly inherit the same after his decease. And all the residue of his property, real and personal, he gave to his son; but in case his son should die without issue, then, it was his will that the whole of his property should be ascertained &c. It was held, that the words in the first clause, taken by themselves, would give the son an estate for life only; but that in consequence of the subsequent words, "in case," &c., he took an estate tail in the real estate, and the absolute interest in the personalty. This is a strong decision, as the devise to the issue was introduced by words of contingency *prima facie* importing a condition precedent, though indeed it was a condition which would have been necessarily implied.

Observation on *Ward v. Bevil*. See § 13.

III. Where no estate tail can be raised in remainder. III. Of course, if the issue were held to take in fee by purchase, no estate tail could be raised by implication in remainder. (See § 159, 165.)

SECTION THE FOURTH.

Cases of a Limitation over on an Indefinite Failure of Issue of a Prior Taker, where there is an Express Devise to his Sons, Daughters, or Children, eo nomine.

I. Where (upon principle) the ancestor would take an estate tail in remainder. I. WHERE there is an express devise interposed between the prior devise to the ancestor and the limitation over on an indefinite failure of his issue, and that intermediate devise is not to his issue, *eo nomine*, but to his sons, daughters, or children, indefinitely, or for life, or in tail; the sounder construction, upon principle, if not upon authority, would seem to be, that the words, introducing the limitation over, raise an estate in him, by implication, in remainder after the estate limited, by the intermediate devise, to his sons, daughters, or children; unless the object of the intermediate devise is to create a perpetual succession of life estates.

See § 583. Rules deduced by Mr. A learned and talented writer on the construc- 577

tion of devises,(d) has submitted the following propositions, Jarman from as "plainly deducible" from the cases:— the cases.

"1st. That the words, *in default of issue*, or words of a similar import, following a devise to *children, in tail or in fee*, mean in default of children.(e) This is free from all doubt.

"2dly. That these words, following a devise to *all* the sons successively in tail male, and daughters concurrently in tail general, are also to be construed as importing *such issue*, even in the case of an executory trust.(f)

"3dly. That words devising the property over on a failure of issue *male*, following a devise to the whole line of sons successively, in tail male, are also referential to such objects;(g) but not, it seems, where such sons take for life only; in which case, they will raise an implied estate tail in the parent.(h)

"4thly. That where there is a prior devise to a *certain number of sons only*, in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail will be implied in the parent, to carry it to the other sons.(i)

"5thly. That in the case of executory trusts, words importing a dying without issue, following a devise to the first and other sons of a particular marriage, in tail male, will be held to authorise the insertion of a limitation to the parent in tail general, in remainder expectant on those estates.(k)

"6thly. That such words, (whether they refer to issue or issue male) following a devise to the eldest son in tail, will not be referable to such son exclusively, but will give the parent an estate tail;(l) and where the devise was to him and his heirs, these words were held also to cut down his fee to an estate tail."

578 Now admitting this to be the result of the then Observations existing authorities, it is conceived that it would on these be very unsatisfactory for the law to remain in such a state. rules.

(d) Mr. Jarman, in his Treatise subjoined to Powell on Devises, 551.

(e) *Goodright v. Dunham*, Doug. 764. See also *Ginger d. White v. White*, Willcs, 348.

(f) *Blackborn v. Edgley*, 1 P. W. 600; *Morse v. Marquess of Ormonde*, 5 Mad. 99.

(g) *Bamfield v. Popham*, 1 P. W. 54, 760; 1 Eq. Ca. Ab. 183, 2 Vern. 427, 449.

(h) *Wight v. Leigh*, 15 Ves. 464.

(i) *Langley v. Baldwin*, 1 P. W. 759; 1 Eq. Ca. Ab. 185, pl. 29; 1 Ves. Sen. 26, S. C.; *Attorney-General v. Sutton*, 1 P. W. 754; S. C. in Dom. Proc. 3 B. P. C. Toml. Ed. 75.

(k) *Allanson v. Clitherow*, 1 Ves. Sen. 24.

(l) *Stanley v. Lennard*, 1 Ed. 87; *Doe d. Bean v. Halley*, 8 T. R. 5.

In those cases where the words "in default of issue," &c., are, according to the first and second of these rules, and the first part of the third rule, not held to raise an estate tail by implication in the ancestor, but are considered as referential to the objects before described, it is of course necessary to supply the word "such," making the words "in default of issue," to mean, in these cases, "in default of such issue:" while, in the other cases, falling under the last part of the third and the three following rules, the words "in default of issue," are allowed to retain their unrestricted meaning. What foundation is there for this distinction? What is it that authorises the Court to supply the word "such," and thereby restrict the meaning of the words, in the former cases, and yet not in the latter? It would seem that there is but one answer that can be given—it is mere unnecessary conjecture, however probable it may be. It is true, that there is a far greater probability that the word issue was used by the testator as merely referential to the objects before described, in the cases falling under the first two rules, and the first part of the third, than in the cases falling under the latter part of the third and the subsequent rules. But still this is evidently a mere question between different degrees of probability, the highest of which comes far short of moral certainty, necessary implication, or violent presumption. Nor is it the most probable of two or more conjectures, founded in some measure upon the words of the instrument, and made in a case where some conjecture must be resorted to, in order to give effect at all to the limitations, *ut res magis valeat quam pereat*. On the contrary, it is a conjecture which controls and restricts the words themselves, though the limitations would be capable of taking effect without any such restriction.

The learned author above referred to, whose 579 work was published in the year 1827, before he proceeds to submit the foregoing rules, observes, that "in the present state of the authorities it is extremely dangerous to hazard any general conclusions upon the subject." And, even looking to those authorities alone, in connexion with the preceding remarks, it would be too much to regard the doctrine as perfectly settled upon authority, much less as satisfactory upon principle. But the fact is, that subsequent decisions have either overruled those cases which construe the words "in default of issue," &c., as merely referential; or have completely unsettled the point.

Parr. v.
Swindels, 4
Russ. 283.

A testator devised real estate to A. for life; and, after her decease, unto and equally between and among the children of A., and, in case she should die without leaving any lawful issue, then, over. Sir John Leach, M. R., held that A. took an estate for life; with remainder to her children, as

tenants in common; for life; remainder, by implication, to *A.* in tail.

And where a testator devised to *M. H.* and *N. H.*, in remainder, during the term of their natural lives, share and share alike; and, in case either should die without leaving issue male of his body; then, to the survivor, during the term of his natural life; and if *M. H.* should (after the deaths of the prior takers) die before *N. H.*, leaving issue male of his body; then one moiety of the estate to the first and other sons of *M. H.*, successively, in tail male; and, in default of such issue, to *N. H.* for the term of his natural life, and, after his decease, to his first and other sons, successively, in tail male; with similar limitations of *N. H.*'s moiety, in case he should die before *M. H.*; and, in case *M. H.* and *N. H.* should both die without leaving any issue male, or, such issue male should die without leaving any issue male, then, to such person or persons as should, at the death of the survivor of them, the said *M. H.* and *N. H.*, be the testator's right heir or heirs. It was argued, that, in the ultimate limitation, an indefinite failure of issue was meant; and, that therefore *N. H.*, in whose lifetime *M. H.* died without issue, took an estate tail in the whole. And the Court of Common Pleas certified accordingly.

Franks v. Price, 5 Bing. New Cases, 87.

[299]

This decision would seem to be wrong. The ultimate limitation over is indeed postponed till an indefinite failure of issue; but then, it appears to be postponed till an indefinite failure of issue of the sons, and not of *M. H.* and *N. H.* themselves; and consequently, the limitation over merely corresponds with, and is referential to, the estate tail expressly given to the sons. For, when it provides for the case of *M. H.* and *N. H.* dying without leaving any issue male, those words do not refer to an indefinite failure of issue; the words issue male there do not mean all the descendants, but merely the sons: for, if it meant all the descendants, then there would be no sense in the latter branch of the limitation over, providing for the case of such issue male dying without leaving any issue male.

Observations on *Franks v. Price*.

The Court, however, appears to have considered the limitation over as amounting to a limitation over on an indefinite failure of issue male of *M. H.* and *N. H.* themselves; and, as such, sufficient to raise an estate tail in *N. H.* by implication, and not merely as referential to the estates tail given to the sons. And hence, whatever may be its authority, it is opposed to the third of the foregoing propositions deduced from the cases by the learned author above referred to. See § 577.

580 Looking, then, to these two decisions, and to the Suggested preceding remarks upon the previous cases, it result of the Vol. II.—31

preceding cases and remarks. [300] would seem that the authorities upon the point must now be regarded as conflicting; and that, in future, the Courts ought to adopt that construction which principle alone would appear to suggest. And that construction, it is humbly submitted, is the one which, in accordance with the recommendation of Lord Redesdale, does "not rely on petty distinctions which only mislead parties, but looks to the words used in the will;" (m) that construction, which, instead of allowing the estate to go over before a failure of issue, contrary to the express words, raises an estate tail in the parent, so as to effectuate the testator's primary or paramount intent of admitting all the issue, so far as the rules of descent will permit, and yet does not sacrifice his other intent to give his sons, daughters, or children, an estate by purchase, but raises an estate tail by implication in remainder after the estate or estates so taken by the sons &c. by purchase.

Observations of Lord Chief Baron Richards on the intention of testators. "I have from long experience, (says a learned Judge) been extremely fearful of adopting, as a system, a theory of what may be the supposed intention of the testator. I am perfectly persuaded, that *that* is not the just mode of collecting the intention of the testator: We must collect it from the paper itself." (n)

II. Where there can be no estate tail in remainder. II. Of course if the sons, daughters, or children were held to take estates in fee simple, no such estate tail could be raised by implication in remainder. (See § 159, 165.) 581

And if, after a prior devise to the ancestor, the property is devised to his unborn sons, daughters, or children, and their heirs, the words "in default of issue" &c. of the ancestor will be construed to refer simply to the sons, daughters, or children, instead of being referred also to their heirs, and of being regarded as showing that the heirs meant are heirs of the body, (o) as they would were the property devised to the ancestor and his heirs, with a devise over in default of issue, without any intermediate devise to the sons, daughters, or children; in which case, as we have already seen, it is established that the word heirs means heirs of the body. 582

See § 564, 565.

III. Where the ancestor will take an estate tail in possession. III. If, as already intimated, the object of the intermediate devise is to create a perpetual succession of life estates, it will be disregarded, and the ancestor will take an estate tail in possession. 583

(m) In *Jesson v. Wright*, 2 Bligh, 51.

(n) Richards, C. B. in *Driver v. Frank*, 8 Taunt 484.

(o) *Goodright d. Docking v. Dunham*, Dougl. Rep. 251, or 3d ed. 264; as stated, Fearnie, 375.

A testator directed his trustees to pay and divide the rents, and profits, and interest of his real and personal estate to and amongst *A., B., C., &c.*, [who were the illegitimate children of *M. D.*] for their lives; and, after their decease, to their respective children; for life; and so to be continued, *per stirpes*, from issue to issue, for life. But, if any of the said children of *M. D.*, or their respective issue, should die leaving no issue, then, the share of him or her so dying, to go and be divided amongst the surviving brothers and sisters, equally, for their lives, and among the issue of any deceased brothers or sisters, according to the share their parent would have had; and, for default of any such issue descending from the said children of *M. D.*, then over. The Vice-Chancellor observed, that besides the intention to give life estates, there was an intention that the estates should not go over until there was a general failure of issue; and that that circumstance, according to *Seaward v. Willock*, and *Jesson v. Wright*, compelled him to hold that the children took estates tail in the real estates. The decree also declared that they had cross remainders in tail in the real estate; and that they took the leaseholds and personal estate absolutely. See § 593. 593a.

SECTION THE FIFTH.

Cases of a Limitation over on a Failure of Children only of the Prior Taker, or on a Failure of Issue within a certain Time.

584 WHEN the limitation over is to take effect, not on an indefinite failure of issue of the prior taker, but on a failure of children only, or on a failure of issue within a given time; there, the limitation over will not raise an estate tail, by implication, in the prior taker, but he will have a life estate, with a contingent remainder over; or a life estate, with a limitation over of a springing interest; or a fee, with a conditional limitation over, as the case may be.

A testator devised to *S. S.*, her heirs and assigns for ever; but, if *S. S.* should die leaving no child or children, lawful issue of her body, living at the time of her death, then, over. It was held, that *S. S.* took a fee, with an executory devise over, and not an estate tail, with a remainder over.

Lands were devised to a trustee and his heirs, in trust to pay annuities to several persons; and, from and after their decease, in trust for *D., L., V.,* and *S.*, (females); and, in case any of them should die leaving a daughter or daughters, then, the share of her or them so dying should go to such daughters as they should be in seniority of age. Provided always, that in case any of them the said *D., L., V.,* and *S.*, should happen to depart this life without issue in

See § 117-127a, 148-158.

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Doe d. Barnfield v. Welton, 2 Bos. & Pul. 324.

See also *Plunket v. Holmes*, 1 Lev. 11; as stated, *Fearn v. Bennett v. Lowe*, 7 Bing. 535.

the lifetime of the said annuitants, then, that the share of her or them so dying should go to certain other persons in succession. And the testatrix devised all the residue of her estates to the said *D.* The Judges certified, that *D., L., V.,* and *S.,* took life estates; that the three daughters of *D., L.,* and *V.,* took life estates in remainder, in their parents' shares; and that *D.* took the remainder in fee in the whole of the premises.

SECTION THE SIXTH.

I. Where the person whose failure of issue is spoken of, is the testator's heir apparent or presumptive, and he takes an estate tail. See § 117-127a.

Cases of a Limitation over on an Indefinite Failure of Issue of a Person to whom no Express Devise is made.

I. WHERE a testator devises to one person, after an indefinite failure of issue of another to whom no express devise is made, but who is the heir apparent or heir presumptive of the testator, the better opinion seems to be, that an estate tail will arise by implication to such person, whose failure of issue is referred to, and consequently that the interest to take effect on that failure of issue, will not be a springing interest, but a remainder after an estate tail by implication in the heir apparent or heir presumptive. 585

For, in the first place, the rule is, that a limitation shall, if possible, be construed as a remainder, rather than as an executory devise. 586

Secondly, the construction ought, if possible, to be, *ut res magis valeat quam pereat*. And if the devise on an indefinite failure of issue, is an executory devise, it is void for remoteness: whereas, if an estate tail is raised, by implication, in favour of the heir apparent or heir presumptive, the express devise is then good as a remainder.

Thirdly, supposing the devise to be good, as of course the testator considered it to be; he, in effect, left the property to descend to the heir at law and his issue, so long as there should be any: can it then be right to refuse to imply an estate tail in his favour, when, virtually, the testator intended and created one by postponing the devise till an indefinite failure of issue of the heir?

This construction not allowed in *Lanesborough v. Fox*, but admitted in other cases. *Daintry v. Daintry*, 6 Durn. & East, 307.

It is true, that, in the case of *Lanesborough v. Fox*, the House of Lords refused to admit such an implication. (p) But it was admitted in the case of *Walter v. Drew*, (q) and also in the case of *Daintry v. Daintry*.

There, a testator gave his only son an annuity, increasing at different ages till 30, to be paid to him till he should marry; and, in case he should marry before 30, then he devised to him and the heirs of his body, all his real and

(p) See Fearn, 447.

(q) See Fearn, 477.

personal estates; and if his son should die without leaving issue of his body, then, over. The son attained 30, and did not marry. It was held, that the son took an estate tail in the real estates, and the absolute interest in the personality; Lord Kenyon, C. J., observing, that, according to the contrary supposition, if the son had lived to 30 without marrying, and then married and had children, there would be no provision for those who ought to have been the first objects of the testator; but that there was sufficient to raise a devise of an estate tail in the son, even in the event that had happened, of his not marrying before 30.

588 II. Where, however, a testator devises to one person, on an indefinite failure of issue of some other person to whom no express devise is made, and such other person is not the heir apparent or heir presumptive of the testator; there, an estate will not accrue to him by implication, (r) nor to his issue, (s) and consequently the devise on an indefinite failure of his issue, is a springing interest, and void for remoteness. (See § 117—127a, 714.)

589 An estate tail does not arise in this case, because, an heir at law can only be disinherited by express devise or necessary implication; and nothing more than a probable, and not a necessary, implication arises in favour of a stranger, from the postponement of a devise till a failure of his issue, since the testator may have postponed the devise for the purpose of allowing the heir at law to inherit in the meantime, and not with the view of benefiting the person whose failure of issue is referred to. Indeed, a case may be put, where such an intention would be by no means improbable; namely, where the heir at law is entitled to the reversion or remainder in other property entailed on the person whose failure of issue is spoken of; in which case, it might be intended that the heir at law should enjoy the property which is devised on failure of such person's issue, as long as, but no longer than, he should be kept out of the entailed property. So that the third of the before mentioned reasons for raising an estate tail by implication, where the person whose failure of issue is referred to is the heir apparent or heir presumptive of the testator, does not apply, where such person is a stranger. And though the other reasons apply, yet they are overcome by the rule, that an heir at law shall not be disinherited by any implication short of necessary implication.

(r) 1 Jarman on Wills, 491.

(s) See Fearn, 449, 450.

CHAPTER THE EIGHTEENTH.

CASES OF A VESTED REMAINDER AFTER A LIFE ESTATE BY IMPLICATION, DISTINGUISHED FROM CASES OF A SPRINGING INTEREST.

I. Devise to testator's heir apparent or presumptive, after the death of another to whom no devise is made, gives the former a remainder.

I. * WHERE a testator devises to his heir apparent 590 or heir presumptive, after the death of another to whom no express devise is made, such other person will take an estate for life by implication, (a) ^b unless the will contains a residuary devise; (b) and consequently the interest of the person who was heir apparent or heir presumptive, is not a springing interest, but a remainder after a life estate. (See § 117—127a, 159.) * The inference that the testator intends to give an estate for life to the other person, is irresistible; as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir, at the death of the other person, and yet that the heir should have it in the meantime, which would be to render the devise nugatory. (c)

II. A similar devise to the residuary devisee has the same effect. See § 117-127a, 159.

II. ^d And, for the same reason, where there is a 591 residuary devise, and the testator devises particular lands to the residuary devisee, to take effect, in possession, on the decease of another person to whom no express devise is made, such other person will take an estate for life by implication; (d) and consequently the interest of the other person will not be a springing interest, but a remainder.

III. But a similar devise to one who is neither heir apparent or presumptive, nor residuary devisee, gives him a springing interest.

III. * But where a testator devises to a person 592 who is neither heir apparent, nor heir presumptive, nor residuary devisee, after the death of A, no estate will arise to A by implication; (e) because ^f it is possible to suppose, that, intending the land to go to the heir during the life of A, he left it for that period undisposed of. (f) And consequently, in this case, the express devisee takes a springing interest, and not a remainder.

(a) 1 Jarman on Wills, 465, 466.

(b) *Ib.* 474.

(c) *Ib.* 466.

(d) *Ib.* 474.

(e) 1 Jarman on Wills, 465. As to the doctrine of implication in certain other cases of unfrequent occurrence, see Mr. Jarman's able observations, p. 467, &c.

(f) *Ib.* 466.

CHAPTER THE NINETEENTH.

LIMITATIONS OF PERSONAL ESTATE, SIMILAR TO LIMITATIONS WHICH WOULD CREATE AN ESTATE TAIL IN REAL ESTATE, ACCORDING TO THE TWELFTH, THIRTEENTH, AND SEVENTEENTH, OF THE FOREGOING CHAPTERS.

598 CHATELS, whether real or personal, cannot be entailed, not being transmissible to the real representatives, as such, and not being within the statute *De donis*, even if they were so transmissible. Chatels cannot be entailed.

593a Such being the case, "it is a general rule, that where the words would raise an estate tail in real estate, they will give the absolute property in personalty." (a) And therefore, General rule resulting from this.

593b I. Where personal estate is limited directly to, or by way of executed trust for, a person and the heirs of his body, in one unbroken limitation, the whole vests in such person himself. (b) I. Bequests to or for a person, and the heirs of his body.

594 II. Where personal estate is limited directly to, or by way of executed trust for, a person for life, remainder to or for the heirs of his body; and such limitations would, according to the rules laid down in the twelfth chapter, on the Rule in *Shelley's Case*, create an estate tail in the first taker or ancestor, if the subject were real property; the entire interest in the whole vests in him, (c) even though only the use, interest, dividends, or profits, are devised to him, and the chattels themselves to the heirs of his body. (d) II. Limitations to or for a person for life, remainder to the heirs of his body, which would create an estate tail in real property.

595 For, as the estate cannot be entailed, the heirs of the body cannot take by descent. And it was not intended that they should take by purchase: for, the word heirs, unexplained, must be taken in its technical sense, as a word of limitation; and, if the property were allowed to go to the first person answering the description of heir, the Grounds of the rule.

(a) Lord Eldon, in *Chandless v. Price*, 3 Ves. 99, as cited, Fearn, 466, (h).

(b) *Seale v. Seale*, 1 P. W. 290, as stated, Fearn, 463.

(c) *Browncker v. Bagot*, 19 Ves. 574. *Kinch v. Ward*, 2 Sim. & Stu. 409, stated § 474. *Douglas v. Congreve*, 1 Beav. 59, stated § 477. *Dod v. Dickenson*, 8 Vin. 451, pl. 25; and *Butterfield v. Butterfield*, 1 Ves. 133, as stated, Fearn, 464. *Webb v. Webb*, 1 P. W. 182, as stated, Fearn, 493.

(d) *Earl of Chatham v. Daw Tothill*, 6 Bro. Parl. Ca. 450, as stated, Fearn, 464—5. *Theobridge v. Kilburne*, 2 Ves. Sen. 238; and *Garth v. Baldwin*, 2 Ves. Sen. 646; as stated, Fearn, 491—2.

See § 429-448.

See § 428.

Elton v. Eason, 19 Ves. 73.

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Britton v. Twining, 3 Meriv. 176.

whole interest must vest in him; and since it must vest either in such person or in the ancestor himself, it is more likely, that the primary or paramount intention of the testator, imported by the word heirs, would be effectuated, by allowing the whole interest to vest in the ancestor; inasmuch as there would then be a greater probability, that all who should from time to time answer the description of heirs of his body, would enjoy the property, than if the whole interest vested in the child or grandchild first answering such description. And besides, it is more likely that the testator would wish the whole to vest in the ancestor, as he is the sole ascertained attracting object and the groundwork of his bounty, than in the person first answering the description of heir, who must be unascertained by and unknown to the testator, and only an object of his regard by reason of his connexion with the ancestor.

A testatrix devised her residuary real and personal estate, upon trust to apply the rents and profits for her son, during his life; and afterwards for the heirs of his body, if any; and, in default of such issue, then in trust for her grandson &c. It was argued, that the words "if any," had a peculiar force in this case, the son being a lunatic. But the Master of the Rolls held, that, even considering this as a mere disposition of personalty, the son took an absolute interest in the personalty, notwithstanding the words "if any," which must always be implied.

And where *A.* directed 20,000*l.*, which he had in the funds, to be firmly fixed, and there to remain, during the life of his wife, for her to receive the interest; and, after her death, to be in the same manner firmly fixed upon *W. C.*, to be so secured that he may only receive the interest during his life; and, after his decease, to the heir male of his body; and so on in succession to the heir at law, male or female; with a direction, that the principal should never be broken into, but only the interest to be received as aforesaid; his intent being, that there should always be the interest to support the name of Cobb as a private gentleman. Sir *W. Grant*, *M. R.*, held, that if this had been a devise of land, it would have created an estate tail; and therefore *W. C.* took the absolute interest. The learned Judge observed, that he did not conceive that the testator had any reference to a future settlement; and even if he had, that would make no difference; that there was nothing to show that the words "heir male" were not used in their strict technical sense; on the contrary, the testator conceived he could make a perpetual entail of the property, so as to make it pass from heir to heir in succession, with a restriction on the power of disposition.

596 III. But, * where the word heirs would be construed a word of purchase, if the subject of the limitations were real estate, according to the rules laid down in the twelfth chapter, on the Rule in *Shelley's Case*; (e) or 'where there are superadded words of limitation to the executors of the heirs; (f) or where there are superadded words of limitation which would carry the fee in real property, followed by a limitation over in default of such issue, apparently intended as an alternative; or * any other words showing that the word heirs was not used in its technical sense; (g) the ancestor only takes a life interest; and the whole remaining interest vests in the issue, if there are any; and if there are no issue, the property reverts to the personal representatives of the testator, or passes to the objects of the alternative limitation.

A testator gave a leasehold messuage to *L. P.*, and to the heirs of his body lawfully begotten, and to their heirs and assigns for ever; but, in default of such issue, then, after his decease, to go to *T. W.*, his heirs and assigns for ever. It was held, that the limitation over was not too remote, Lord Kenyon, C. J., intimating that it was a limitation with a double aspect.

597 IV. Where personal estate is devised or bequeathed either directly to or by way of executed trust (See § 489) for a person and his issue, whether in one unbroken limitation, or in two limitations; and such limitation or limitations would, according to the first rule in the thirteenth chapter, create an estate tail in the ancestor, if the subject were real property; * the entire interest in the whole vests in him. (h)

A testator gave all his real and personal estate to *A.* and his male issue. For want of male issue after him, to *B.* and his male issue. Sir W. Grant, M. R., held that *A.* took the absolute interest in the personal estate.

So where a testator gave 500*l.* stock to *S. T.*, to receive the interest, during life, and then, to her issue; but, in case of her death without issue, the said 500*l.* to be divided between &c. *T. S.* died without issue. Lord Langdale, M. R., held, that she took the absolute interest under the first words; and that the limitation over was void for remoteness.

Michell, 1 Mad. 473, as stated § 529.

(e) See *Peacock v. Spooner*, 2 Vern. 43, 195; and *Dafforne v. Goodman*, 2 Vern. 362; as stated, Fearn, 493; in which cases the term was not limited to the prior takers for life, but for so many years as they should live.

(f) *Hodgeson v. Bussey*, 2 Atk. 89, as stated, Fearn, 494.

(g) See *Read v. Snell*, 2 Atk. 642, as stated, Fearn, 473, 494.

(h) But see *Knight v. Ellis*, 2 Bro. C. C. 570; and *Warman v. Seaman*, Fin. Chan. Rep. 279; as stated, Fearn, 490, (a), and 495.

Gibbs v.

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Tait, 8 Sim.
132.

Again; a testator gave what should be remaining of the residuary monies, the interest of which he had given to his wife *T. D.*, during widowhood, unto and equally among all the daughters of *T. D.*, and their issue, with benefit of survivorship and accruer. Sir L. Shadwell, V. C., held, that the issue of a daughter who died in the lifetime of *T. D.*, took nothing; for, the testator spoke of the residue, as if it would be uncertain, until the death or second marriage of his widow, what the residuary estate would consist of; and therefore he meant those only to take who should be in existence when the property was to be distributed. [See *Howes v. Herring*, M'Clelland & You. 295, stated § 655.] Secondly, that the two surviving daughters took absolutely; for, it would be very inconvenient that they and their issue should take simultaneously.

*Turner v.**Capel*, 9
Sim. 158.

And where a testator gave his residuary estate in trust for his wife, for life; and after her death, he gave the same to his son and daughters, share and share alike, and their respective issue; with benefit of survivorship unto and between his said children, or their issue respectively. Sir L. Shadwell, V. C., held, on the authority of *Pearson v. Stephen*, that the son and daughter took absolutely; and not for life only, with remainder to their issue; and that the survivorship was to take place in the event of there being a failure of issue of either of the children in the lifetime of the widow.

V. Disposition in favour of a person and his issue, which would not create an estate tail in real property.

V. But where personal estate is devised or bequeathed either directly to, or by way of executed trust for, (See § 489.) a person and his issue, whether in one unbroken limitation, or in two distinct limitations, and such limitation or second of such limitations would, according to the second rule in the thirteenth chapter, give the issue an estate tail by purchase; the ancestor only takes for life; (i) and the whole remaining interest vests in the issue, if there are any; and if there are no issue, the property reverts to the personal representatives of the testator, or if there is an alternative interest, passes to the objects of the alternative limitation. 597a

See § 128-136.

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VI. Executory trust in favour of a person and his issue.

See § 531-2.

Stoner v. Curwen, 5
Sim. 264.

VI. Where personal estate is limited in favour of a person and his issue, by way of executory trust, (See § 489, 491) the same construction will be adopted as that which is adopted in the corresponding case of real estate, even though there may be a limitation over on an indefinite failure of issue. 598

A testator gave one third of his residuary personal estate to his niece, which he desired might be settled by his executors on his said niece, for her separate use, during her life,

(i) See *Lamplsey v. Blower*, 3 Atk. 308, as stated, Fearn, 478, 495.

but to devolve to her issue at her death; and, failing issue, then, to revert to his nephew. This being an executory trust, Sir L. Shadwell, V. C., directed a settlement to be made to the niece for life, for her separate use; and, after her decease, in trust for such of her children as should be living at her death, and for such issue of children dying in her lifetime as might be living at her death; the issue of any deceased child to take such share only as the deceased child would have taken, if living; and, if there should be no child, nor any issue of a child of the niece living at her death, then in trust for the nephew.

599 VII. ^aWhere personal estate is limited, either VII. Limitations over on an indefinite failure of issue.
directly to, or by way of executed trust for, (See § 489, 491) a person indefinitely, or for life, with a limitation over on an indefinite failure of his issue; the whole interest vests in the ancestor. (k)

In this case, it is not intended that the property should go over, except on failure of his issue, but that his issue should be benefited by it; and as there is no direct gift to the issue, to enable them to take by purchase, the nearest way of effectuating the intention, is, to give the entire interest to the ancestor, that they may have the benefit of the property, derivatively, through him; especially as the other intent of the testator, that the property should go over on failure of issue, could not have effect; because the limitation over on an indefinite failure of issue, except by way of remainder after an estate tail, is, as we shall see in a subsequent chapter, void for remoteness. 714. [313] See § 706, 714.

600 VIII. But, where the limitation over is on failure of children only, or on failure of issue within a given time, the ancestor will have a life estate, with a limitation over in the nature of a contingent remainder, or children with a limitation over of a springing interest; or the entire interest, with a conditional limitation over. (See § 159, 117-127a, 148-158.) VIII. Limitations over on failure of issue within a given time.

A testator bequeathed the residue of his personal estate to *H. D.*, for his own use and benefit; and, in case *H. D.* should die in the testator's lifetime, or afterwards, without having any child or children, then over. *H. D.*, who was an illegitimate child, survived the testator, but died without having had a child. It was argued for the Crown, that the words would create an estate tail by implication in real estate; in which case, *H. D.* would have taken the personal estate absolutely, and the Crown would have been entitled to it, as he died without issue. But the Vice-Chancellor, after observing that the words were not synonymous

(k) See *Fearne*, 466, note (h), and 490, note (a); and *Burford v. Lee*, 2 Freem. 210, as stated, *Fearne*, 460.

with the expression "without issue," held that the gift over took effect.

Bradshaw v. Skilbeck, 2 Bing. New Cas. 182. And where a testator devised leaseholds in trust for his daughter, for life; remainder to her two eldest sons, for and during the terms of their natural lives, as tenants in common. And, in case his daughter should not have a son or sons to attain 21, and of such sons dying without lawful issue, then, to all and every the daughters of his daughter &c. It was held that the sons took only for life, with limitations over, and not a *quasi* estate tail; Tindal, C. J., observing, that these words did not import a giving over of the leasehold upon a general failure of issue of the two sons, which would be an estate tail, but a dying without issue under 21.

CHAPTER THE TWENTIETH.

LIMITATIONS OF PERSONAL ESTATE TO OR IN TRUST FOR THE PERSONS WHO SHALL FROM TIME TO TIME BE ENTITLED TO REAL ESTATES ENTAILED.

I. Where such limitations are not by way of executory trust. See § 489, 491.

I. WHERE chattels real or personal are either 601 directly given to, or directed to be held or enjoyed by, the person and persons who shall from time to time be entitled to real estates which are entailed; and there is no direction for, or reference to the making of a future settlement or conveyance, for the purpose of securing the use of such chattels to such person or persons; the chattels, subject to the life interests of the prior tenants for life, if any, of the real estate, become the absolute property of the first tenant in tail, on his attaining a vested interest in the real estate, whether at his birth, or "at 21,(a) or at some other time.

Fordyce v. Ford, 2 Ves. 586.

A testator devised freehold estate to his brother and his wife, for their lives; remainder to A. and the heirs male of his body; with remainders over; and he directed that certain leasehold premises should belong to the several persons, in succession, who, by virtue of the will, should for the time being be entitled to the freehold, so far as the rules of law would admit. Sir R. P. Arden, M. R., held, that A. took the leasehold absolutely; it being clear that the testator meant an estate tail in A. as to the freehold, not knowing he could put it in his own power; and he meant the same estate, with the same succession to the same line of issue, in the leaseholds, so far as the rules of law would permit.

(a) *Trafford v. Trafford*, 3 Atk. 347.

And where a testator gave leasehold estates, in trust to pay the rents and profits to the persons for the time being entitled to real estate under limitations thereof in strict settlement, with power to the trustees, at any time, with consent of the persons so entitled, or if minors, at their own discretion, to sell and invest the produce in real estate to the same uses. Lord Eldon, C., held, that the leaseholds vested absolutely in the first tenant in tail on his birth; and that the power of sale was void, as it might travel through minorities for two centuries.

Ware v. Polhill, 11 Ves. 257.
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602 II. But where such a disposition is made of chattels, by way of trust executory, that is, where there is a direction for, or reference to the making of, some future settlement or conveyance, for the purpose of finally and formally declaring the trusts, which do not appear to have been so declared by the instrument containing such direction or reference; in such case, the chattels do not vest absolutely and indefeasibly in the first tenant in tail, until he attains the age of 21 years.

II. Where the disposition is by way of executory trust. See § 489, 491.

603 This distinction is only in accordance with the distinction which has been made, in other cases, between trusts executed and trusts executory.

Distinction exhibited in these two rules is in accordance with the distinction made in other cases. Grounds of the distinction.

604 In the case of a trust executed, the trust being finally declared by the instrument creating it, a Court of Equity can give the words no other force than that which they literally possess, in themselves, consistently with the rules of law; for, in such case, the Court is not called upon to frame new limitations, in order to carry out the intention; but to act upon limitations or directions already framed and subsisting.

But, in the case of trusts executory, all that is done by the testator or settlor, is, to intimate the mode in which he wishes his property to be settled by some future settlement or conveyance: and a Court of Equity is at liberty, and, indeed, feels bound, to settle or convey it in that mode

605 which will best accord with the spirit of the party's directions. In the case of a trust executory, there is not that degree of presumption that the party has accurately expressed what he intended, which there is in the case of a trust executed. And therefore, whether a Court of Equity would have been justified in giving greater effect to the supposed intention of the party, in the case of a trust executed, or not; there can, at all events, be no doubt, that it is justified in carrying out his intentions, in the case of a trust executory. And by not giving an absolute interest in the chattels to the tenant in tail, before 21, the Court renders such chattels unalienable, in the case of an executory trust, for the same length of time as the real estate, and secures their transmission from one per-

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son entitled to the real estate, to another, as long as the law will allow.

If a Court of Equity were not to give effect to executory trusts in this way, it would be an anomaly of the most arbitrary kind; it would be refusing to make a distinction between trusts executed and trusts executory, in this respect, while, in others, a distinction is uniformly made.

Executory trusts should be construed according to the second rule; especially when created by marriage settlement or articles.

A gift through the medium of a direction is not necessarily a trust executory.

For this reason, executory trusts ought to be construed in the manner above mentioned, whether they are created by marriage settlement or articles, or merely by will. But such a construction should be adopted more especially in the case of marriage settlements or articles: for, there, the issue in remainder are all purchasers, instead of being volunteers.

It has sometimes been thought that where the disposition is made, not by a direct gift, but through the medium of a direction that the chattels shall go to persons sustaining a certain character with reference to the realty, the trust is a trust executory. It is true that Fearnce uses the word directory, as synonymous with executory, but, in his definition of a trust executory, he only includes those which refer to the execution of a future settlement or conveyance. (b)

And though an executory trust is necessarily directory, yet, a trust may be directory, and at the same time, executed, where it is finally declared in the instrument creating it. And, it may be asked, what substantial difference is there, upon principle, between a trust which is, and a trust which is not, directory in its terms? If a testator gives a sum of money in trust, and directs it to be equally divided among a given number of persons; and there is no gift of the money to those persons, independently of the direction to divide the money between them; is not this the same thing, so far as the present question is concerned, as if there were distinct gifts of the respective shares in trust for the respective individuals? Even where chattels are bequeathed without the medium of a trust, the legal right to them vests in the executors, as much as it does if the executors are directed to dispose of them. So that, upon principle, as well as upon the indirect authority of Fearnce, in his definition of trusts executory, such directory trusts as these, are trusts executed, and not executory, so as to call for that kind of construction which trusts executory in general receive.

(b) Fearnce, 143.

614 In some cases the words "so far as the rules of law will permit," have been inserted. And, in one sense, "these," as Lord Hardwicke says, "are very material words;" namely, as precluding any intendment contrary to the rules of law: "for," His Lordship adds, "it is impossible to object that the testator had any intention contrary to the rules of law; for he hath by these words delivered himself from any imputation of the kind."(c) But they have no force in enabling the Court to tie up the chattels for a longer time than that for which they could be tied up, if these words were omitted: for they imply no more, in this view, than would be implied without them; and their meaning is capable of being satisfied by supposing them merely indicative that the testator was aware of the different natures of real and personal estate.(d)

615 But they do not enable the Court to tie up chattels for any longer time. Cases.

616 Having said what appears to the author to be the true doctrine upon the subject of this distinction between trusts executed and trusts executory, he now proceeds to draw the reader's attention to the cases relating to it.

Henry, duke of Newcastle, covenanted, on the marriage of the Earl of Lincoln, to settle leasehold estates, in trust for such persons, and such or the like estates, &c., as far as the law would allow, as declared concerning real estate thereinbefore limited to the earl of Lincoln, for life; remainder to his first and other sons in tail male; remainder to Lord Thomas Pelham Clinton, second son of the Duke, for life; remainder to his first and other sons in tail male; with divers remainders over. The Earl of Lincoln died, leaving issue a son, Henry Pelham Clinton, who died soon after his birth, and a daughter, Catherine Pelham Clinton. Henry, Duke of Newcastle, died, and was succeeded by his only surviving son, Lord Thomas Clinton, who died: upon which his eldest son, Henry, became Duke of Newcastle. It was insisted, that, upon the death of the Earl of Lincoln, his son, Henry Pelham Clinton, became entitled to the leaseholds; and that, upon his death, the Countess Dowager of Lincoln became entitled thereto, as his personal representative. But Lord Loughborough, C., held, that, in cases of marriage articles, where leasehold property is to be the subject of a settlement of freehold estate, and the limitations of the freehold go to all the sons in succession; the settlement to be made of the leaseholds, is to be analogous to that of the freehold; (3 Ves. 397) [i. e. analogous, not in terms,

The Duke of Newcastle v. The Countess of Lincoln, 3 Ves. 387.

(c) *Gower v. Grosvenor*, 5 Mad. 347.

(d) See *Vaughan v. Burslem*, 3 Bro. C. C. by Belt. 106; and Lord Redesdale's note, S. C. 104.

but in effect;] and that no person should be entitled to the absolute property, unless he shall attain 21, or die under that age, leaving issue male. (*Ib.* 398.) His Lordship observed, that, admitting that if the subject of the articles were freehold, and the articles were so drawn as to give an estate to the heirs of the body of the father, it would be impossible that he should be tenant in tail, but he must be reduced to an estate for life; in parity of reasoning, it was impossible, in this case, to give a vested interest to a son upon his birth. (*Ib.* 398.) The decree directed the leaseholds to be settled in trust for Henry, Duke of Newcastle, and his executors, administrators, and assigns; but if he should die under 21, without leaving issue male living at the time of his death, then, in trust for his brother, Thomas Pelham Clinton, in like manner; with similar limitations over. The case was carried by appeal to the House of Lords, who affirmed the decree, with the exception of leaving out the limitations subsequent to the word "assigns," in consequence of the Duke having attained his majority, whereby such limitations became unnecessary.

The Countess of Lincoln v. The

[319]

Duke of Newcastle,
12 Ves. 218.

Difference of opinion among the Judges in that case.

Observations of Lord Loughborough.

Great difference of opinion existed, in terms at least, in regard to this case, between Lord Loughborough, who made the above decree, and Lord Ellenborough, C. J., Lord Eldon, and Lord Erskine, C., who presided when it came before the House of Lords.

When the cause was heard, and previously to delivering judgment, Lord Loughborough is reported to have expressed himself as follows: "I lay no great stress upon the words, 'as far as the law will admit;' but I put it to you, whether, in the nature of things, there is not a radical and essential difference between marriage settlements and wills. The parties contract upon a settlement for all the remainders. They are not voluntary, but are within the consideration. The issue then, are all purchasers." (3 Ves. 394.)

Observations of Lord Eldon in the same case,

On the other hand, Lord Eldon said, that there was no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles; and that such a distinction would shake to their foundation the rules of equity. (12 Ves. Jun. 227.) He admitted, however, that there is a distinction, if the will makes a direct gift, and the articles contain a covenant to be executed. (*Ib.* 230.)

and in *Jervoise v. The Duke of Northumberland.*

And in *Jervoise v. The Duke of Northumberland*, 1 Jac. & Walk. 574, Lord Eldon said, if it was supposed, that he said there was no difference between marriage articles and trusts executed, he never meant to say so. And he further observed, that, in marriage articles, all the considerations that belong peculiarly to them afford

prima facie evidence of intent which does not belong to executory trusts under wills. But that he took it, according to all the decisions, allowing for that, an executory trust in a will is to be executed in the same way.

621 Now, with regard to this difference in opinion, Meaning of the expres-
 réal or apparent, it may be observed that Lord sions used
 Loughborough's meaning might be, and probably was, not by Lord
 ought, on principle, to be adopted in a covenant to settle in Loughbo-
 a marriage settlement, from that which would be proper in rough.

[320]

in an executory trust in a will; but that, even admitting that similar words to those in the principal case, had been construed, in the case of a will, to confer an indefeasible vested interest on the first tenant in tail, on his birth; yet that a Judge, who did not approve of that construction, was not bound to adopt it in the case of a marriage settlement, where, besides the mere argument of intention, there was the additional ground, that the issue in remainder were all purchasers; whereas the issue in the case of a will are all volunteers. Lord Loughborough did not say, or intimate, either that he approved or disapproved of such a construction, in the case of a will; or that such a construction had ever been made, in the case of an *executory* trust; but merely showed, that, whether such a construction had been made, or not, in *Foley v. Burnell*, 1 Bro. C. C. 274, and *Vaughan v. Burslem*, 3 Bro. C. C. 101, which were pressed upon him; still, a different construction might fairly be adopted in the principal case, it being a case of a marriage settlement, and not of a will.

622 Whatever was Lord Loughborough's meaning, however, surely it would only be right that a different construction should be made in the case of marriage articles, if it were true that such a construction as that above-mentioned had been adopted in the case of wills.

623 But, supposing for a moment, (as will appear hereafter,) that no such construction has in fact been made, in the case of an *executory* trust created by will; and that the matter is *res integra*; it is humbly submitted that such a construction ought never to be adopted, even in the case of a will. For, it is allowed, on all hands, that a Court of Equity has the liberty to mould the limitations, so as to execute the intention as far as the law will permit, in the case of an *executory* trust, where a conveyance is directed—that the Court is not restricted to the technical operation of the very words themselves, as they stand, in the case of a trust executory, as it is in the case of a trust executed. And yet the construction which gives the absolute property to the first tenant in tail at his birth, only

An execu-
 tory trust by
 will ought
 not to be
 construed so
 as to confer
 an indefea-
 sible vested
 interest on
 the first ten-
 ant in tail at
 his birth.

ties up the property to the extent to which a trust executed, couched in similar terms, would tie it up. (See *Carr v. Lord Erroll*, 14 Ves. 478.)

And in fact

[321]
no such construction of
an executory trust has
been adopted.

But, when the cases are closely examined, the fact seems to be that no such construction of an executory trust has ever been made, even in the case of a will. Lord Eldon thought it had in *Foley v. Burnell*, and *Vaughan v. Burslem*; but he appears to have fallen into a misapprehension, in regarding those as cases of executory trusts specifically and properly so called, that is, of executory trusts which are opposed to trusts executed, and which alone are the subject of the above distinction.

Foley v. Burnell, 1 Bro. C. C. 274,

was not an
executory
trust.

Nor was
Vaughan v. Burslem, 3 Bro. C. C. 101.

In *Foley v. Burnell*, the testator bequeathed plate and other personal chattels, to be held and enjoyed by the several persons who from time to time should be entitled to the use and possession of the real estate, as and in the nature of heir-looms; and Lord Thurlow, C., held, that the chattels vested absolutely at his birth, in the first tenant in tail, who died 14 days afterwards; and that his father, the tenant for life, was entitled to them as his administrator. The cause was reheard; but the decree was affirmed by the Lords Commissioners, Lord Loughborough, Mr. Justice Ashurst, and Baron Hotham; and afterwards by the House of Lords. But, in this case, there was no direction that any conveyance of the chattels should be made; and accordingly, Mr. Justice Ashurst treats the trust as a trust executed. "Where the testator leaves it to the Court," says the learned Judge, "the Court will protect the property, as far as may be: here, he has taken upon him to be his own conveyancer."

So, in *Vaughan v. Burslem*, the testator directed that chattels should go, as heir-looms, with his real estate, and be held and enjoyed by the person or persons for the time being entitled to his real estate, as far as the rules of law and equity would permit; and Lord Thurlow held, that the tenant for life, as personal representative of the first tenant in tail, who died six weeks after his birth, was entitled to the chattels.

But here again, there was no allusion to any conveyance; and hence Lord Ellenborough, though he said he could not reconcile this decision with the decree in the principal case, yet treated the trust as executed, observing, that it was the case of a testator executing his own purpose.(e)

[322]
Nor was
Carr v. Lord Erroll,
14 Ves. 478.

And Sir W. Grant, M. R., must have considered it in the same light, from what he says of the case of *Carr v. Lord Erroll*, 14 Ves. 478. In that case, the testator directed that all his plate &c., at his mansion house, should remain there, as heir-looms; and devised the same to trustees, upon trust, to permit the same to go together with the mansion, to such

(e) 12 Ves. 225.

persons as should from time to time be entitled to it, for so long a time as the rules of law and equity would permit. Sir W. Grant held that the absolute interest vested in the first tenant in tail, and, upon his death under age, passed to his personal representative. And His Honour said, that the only difference between that case, and *Vaughan v. Burslem*, was, that trustees were interposed in the former; and that there was nothing executory in the trust interposed; and therefore the question, whether there was any difference between an executory trust by a will and a covenant in marriage articles, did not arise.

625 The fact is, that Lord Eldon considered executory trusts, as opposed to trusts executed, to comprehend trusts in which the gift was made by way of direction that the property should be enjoyed by persons sustaining a certain character. His Lordship says, of *Foley v. Burnell*, that the clause being clearly directory, it was one which a Court of Equity would mould to the purposes of the testator, upon its general principles. But it will have already appeared, that these directory trusts do not belong to those which a Court of Equity will attempt to mould, so as to carry out the intention of the party to a more full extent than would be accomplished by the technical operation of the words themselves.

626 Lord Eldon objected, that the decree in the principal case, did not accomplish that which it was designed to accomplish; that, in fact, it did not tie them up as far as the law would permit; for, the moment a son came to the age of 14, he might (subject to the contingency of his death under the age of 21, not leaving issue male,) bequeath the leasehold estate; and if a son died under 21, leaving issue male, that issue male would not take the leasehold estate, as he would the real estate, but the leasehold estate would be part of his general personal estate, which might go to his next of kin, and equally to the wife with them. And in *Burrell v. Crutchley*, 15 Ves. 553, Lord Eldon, C., said, the difficulty that always occurred to him, was, what was to become of it if the party died under age, leaving issue. But, Lord Loughborough gave an answer to these objections, when he said, that it was much more probable that a new-born child should die, than that a son should have a child, and live till very near the age of 21, and then die. If, however, such an improbable event should happen, the intention to keep the real personal estate together would still be in a great measure effectuated. (f)

[329]

Observations on some other remarks of Lord Eldon. Lord Eldon remarked, that by omitting the 629 limitations subsequent to the word "assigns," as above mentioned, a great deal of difficulty was removed: for the decree [of the House of Lords] could not serve as a guide to conveyancers, as to what is to be done under any other circumstances than a tenant in tail in possession attaining 21. And in *Burrell v. Crutchley*, 15 Ves. 553, His Lordship said, he did not take the case to have decided anything with regard to any case that might possibly arise, except that precise case, when the Duke had attained 21. Upon this, it is to be observed, that the decree 630 sufficiently establishes this point—that, in the case of a covenant in a marriage settlement, of the kind in question, the chattels do not vest in the tenant in tail absolutely on his birth. For, Henry, Duke of Newcastle, who had attained 21, was not the first tenant in tail under the settlement. Henry Pelham Clinton, son of the Earl of Lincoln, was the first tenant in tail; and yet, as he died an infant, it was decided by the House of Lords, that the chattels did not pass to his personal representative, but belonged to Henry, Duke of Newcastle, the second tenant in tail, though, as the latter had attained 21, it became unnecessary to decide whether they vested in a tenant in tail, at his birth, or on the death of a preceding tenant in tail, subject to be divested, or whether the vesting was suspended until 21; and if they vested at his birth, whether they were subject to be divested simply in the event of dying under 21, or in the double event of his dying under 21, without issue generally, or issue male.

[324]

Observations of Lord Erskine. The Lord Chancellor, Lord Erskine, coincided 631 in the views of Lord Ellenborough, in regard to the propriety of the decree made by Lord Loughborough. Lord Erskine, after saying that he found it impossible to reconcile all the cases, observed, that a Court of Equity should give a construction to an executory covenant of this kind, agreeably to what would have been the direction of a conveyancer consulted by the party. That if he would be his own conveyancer, and create the estate, the Court had no jurisdiction to alter that estate; but, upon such a covenant as this, the Court had jurisdiction, under the authority of *Gower v. Grosvenor*; and it was reasonable that the intention should be executed when the Court could see it.(g)

Remarks thereon.

It is to be lamented that Lord Erskine should 632 have rested his decision on the opinion of Lord Hardwicke, in *Gower v. Grosvenor*; a case in which the terms of the will cannot be substantially distinguished from those in *Foley v. Burnell*, and *Vaughan v. Burslem*; a

case, therefore, of a trust executed, and not of a trust executory; a case in which nothing was decided; and a case in which the question was altogether different from the point at issue in *The Countess of Lincoln v. The Duke of Newcastle*.

In *Gower v. Grosvenor*, Sir Richard Grosvenor devised *Gower v.* real estate to Thomas Grosvenor, for life; remainder to his *Grosvenor*, first and other sons in tail male; remainder to Robert Gros- 5 Mad. 347. venor, for life; remainder to his first and other sons in tail. And he declared his will and mind to be, that his library, &c., should go as heir-looms, as far as they could by law, to the heir male of his family successively, as his real estate was thereby settled. Sir Thomas Grosvenor died, without ever having any issue. Lord Hardwicke came to no decision; but he was of opinion, that the chattels were given to Sir Thomas Grosvenor; and afterwards to his son, if he should have any, but as he had none, to Sir Robert.

633 Now, it must be observed, that here the ques- [325] tion was between one tenant for life and another; Observations and consequently Lord Hardwicke's opinion has in reality thereon. no bearing upon the question in *The Duke of Newcastle v. The Countess of Lincoln*, where the question was a question between one tenant in tail and the representative of a deceased tenant in tail, relating to the time when the chattels vested absolutely in the tenant in tail. True it is, that Lord Hardwicke said, that there was only a directory clause to the executors; and that when a man makes use of words of this sort, he does not make the limitation himself, but he leaves it to the law to do it for him. But His Lordship does not say, that this was an executory trust expressly referring to a future settlement or conveyance. And all that he seems to have meant, is, that the testator had not made the limitation himself, in direct terms, but had left it to the operation of law, to mould an express limitation out of the directions he had given, according to the legal import of those directions, by giving the same effect to them, as to express limitations of the same legal import. In other words, the learned Judge seems to have meant that which he had just before observed, namely, that there were no express words of devise; and that it would be a very hard construction to call this an express gift or legacy to the party, on purpose to defeat the intention of the testator, and though Sir Thomas enjoyed them for his life, yet the intention of the testator was, to have them go in succession. (*Ib.* 349.)

634 Observations might be made upon other parts of Concluding Lord Eldon's speech; but it does not seem neces- observations sary to do so for the present purpose. From what has been on the cases said it will probably be sufficiently apparent, that, notwith- above noticed.

standing the objections of Lord Eldon, and the impossibility, in the opinion of Lord Ellenborough and Lord Erskine, of reconciling all the cases; yet it is clear, upon the authority of Mr. Justice Ashurst, Lord Ellenborough, and Sir William Grant, that the cases of *Foley v. Burnell*, and *Vaughan v. Burlem*, are cases of trusts executed; and that, upon the authority of Lord Loughborough, Lord 635 Ellenborough, and Lord Erskine, as well as upon principle, an executory trust of the kind in question, especially when created by marriage settlement or articles, ought not to be construed so as to vest the chattels real or personal in the first tenant in tail of the real estate, in an absolute and indefeasible manner, at his birth. And 636 assuming, upon the authority of Mr. Justice Ashurst, Lord Ellenborough, and Sir W. Grant, and upon principle, that *Foley v. Burnell*, *Vaughan v. Burlem*, *Carr v. Lord Erroll*, and *Gower v. Grosvenor*, were cases of trusts executed, while the case of *The Duke of Newcastle v. The Countess of Lincoln*, was a case of an executory trust, it would seem necessarily to follow, that the latter case does not at all interfere with the former. 637 If the former cases are considered as trusts executed, according to the opinion of Mr. Justice Ashurst, Lord Ellenborough, and Sir W. Grant, all the cases are in harmony, and the whole doctrine is clear and consistent. But, if these cases are considered as trusts executory, contrary to the opinions of those learned Judges, then, the cases are totally irreconcilable, and the subject of the present chapter, and in fact the whole subject of executory trusts, is involved in the greatest uncertainty and confusion.

[327] CHAPTER THE TWENTY-FIRST.

WORDS APPARENTLY AMOUNTING TO A MERE ALTERNATIVE LIMITATION, BUT IN REALITY CONSTITUTING A REMAINDER; AND VICE VERSA.

SECTION THE FIRST.

A General Rule Suggested.

A SUBSEQUENT limitation, in doubtful cases, ought to be construed as a remainder or *quasi* remainder, rather than as an alternative limitation. 638

See § 159,
168-169b,
128, 161.

639 A remainder or *quasi* remainder, as will appear in a subsequent chapter, is ordinarily capable of operating as an alternative limitation, in case of the non-vesting of the prior interest: whereas an alternative limitation can never operate as a remainder or *quasi* remainder; and yet, it may be clear that the testator did not intend that the subsequent limitation, which is capable of taking effect as a remainder or *quasi* remainder, should entirely fail, merely because the prior limitation had once vested, though merely for a moment. See § 669. See § 130.

640 On the contrary, in all cases where the words do not clearly constitute a mere alternative limitation; and there is no indication, in any other part, that they were intended to create a mere alternative limitation; and where the prior limitation does not carry the fee in real property, or absolute interest in personal property, and consequently the subsequent limitation can operate as a remainder or *quasi* remainder; there, it would appear clear that the testator intended that such subsequent limitation should be allowed to operate as a remainder or *quasi* remainder, when it could not operate as an alternative, in the events that happened. See § 159, 165.

641 For, first, where such subsequent limitation is followed by a still more remote limitation, it can hardly be supposed, that such more remote limitation, was intended to exclude the less remote limitation, in one event, when, in another event, it would have had to await the expiration of the less remote limitation: those who were the prior objects of the testator's bounty, in the one event, would surely be the prior objects in the other event, when that event could have no connexion with or influence upon the testator's preference of the objects of the less remote limitation to the objects of the more remote limitation. [328]

642 And, secondly, where such subsequent limitation is not followed by any other ulterior limitation, and consequently it is then a question between the person claiming under it, and the heir at law, or the person or persons entitled to the undisposed of personal estate, the better opinion would seem to be, that, even in this case the subsequent limitation should be allowed to operate as a remainder or *quasi* remainder.

643 It is true that the heir can only be disinherited by express words or necessary implication. But it was said by the Lord Chief Baron in *Toldervy v. Colt*, and, with the above qualification, truly said, that "the doctrine has long been exploded that the heir at law has any particular privilege or favour from the Court." "What he has (added Mr. Baron Alderson) is a clear *prima facie* title, which you may show to

644 have been taken away." In the case supposed, See § 638. 1 You. & Coll. 621.

there are express words: but then those words are ambiguous, and the Court must lean one way or the other. Must it lean in favour of the heir, who does not seem to have been an object of the testator's regard, and against the person who, in one event at least, was clearly intended to take, and who would seem, judging *à priori*, to be equally an object of the testator's bounty, in the other event? The observation of the Lord Chief Baron, approved as it evidently was by the other learned Judge, would seem clearly to negative this; and numerous cases in which wills have been so construed, as to disinherit, prove the truth of that observation.

No rule such as that above suggested seems to 645
have been laid down by authority; but there have
See § 665. been cases in which the principle has been virtually acted on.

[329] SECTION THE SECOND.

Certain Rules of a more Specific Character.

Devise to a person, and to his issue, or his sons, daughters, or children, with a limitation over on his death without issue, &c. 646
WHERE real estate is devised to a person, and to his issue, or his sons, daughters, or children, with a limitation over on his death without issue, or without leaving issue, or for want, or in default, or on failure of issue, or of such issue, or of sons, daughters or children; and it is desired to ascertain whether such limitation over is a remainder, or an alternative limitation; it is necessary, in the first place, to determine what estate the ancestor or his issue take. And,

I. Where the ancestor or his issue take an estate tail, or the issue take a life estate in remainder, and such estate is vested and absolutely limited. 647
I. If, under the rules in the thirteenth and seventeenth chapters, or otherwise, the ancestor or his issue take an estate tail, or the issue take a life estate in remainder; and such estate is a vested and absolutely limited estate; the limitation over, as regards such estate, is a remainder, and not an alternative limitation: because an alternative limitation is inoperative and bad in its very creation, unless the interest which it is intended to confer, is a substitute for a contingent or an hypothetically limited interest; (159, 128, 190) and the construction ought to be such, *ut res magis valeat, quam pereat*.

A testator devised an estate to *A.*, for life; remainder to trustees to preserve, &c.; remainder to all the children of *A.*, as tenants in common, and not as joint tenants; and, for want of such issue, to *B.*, for life; remainder to trustees to preserve, &c.; remainder to all the children of *B.*, as tenants in common, and not as joint tenants; and, for want of such issue, to *C.* in fee. *A.* had children living at the date of the will. The Master reported, that all the limitations in the will, subsequent to the devise to the children of *A.*, failed,

Ashley v. Ashley, 6 Sim. 358.

as being only to take effect in case there never was any such child. But, Sir L. Shadwell, V. C., held, that the children of *A.* took estates for life, as tenants in common, with cross remainders between them, for life [notwithstanding the words "and not as joint tenants"]; remainder to *B.*, for life; remainder to the children of *B.*, as tenants in common, for life; with cross remainders between them, for life; remainder to *C.* in fee. [330]

The following case also may perhaps be fairly regarded as an illustration of the same principle. A testator devised thus:—"to *S. M.* and her heirs, if she has any child; if not, after the decease of she and her husband, then I give it *F. M.* and her heirs." *S. M.* had a child, who was living at the date of the will, but died four days afterwards, in the testator's lifetime. It was held, that *S. M.* took an estate tail; "heirs" being explained by the word "child" to mean "heirs of the body;" and that, upon her death without heirs of her body, the property passed to *F. M.* *Doe d. Jearad v. Ban-*
nister, 7 *Mees. & W.* 292.

648 II. And even if the estate for life or in tail is II. Where contingent, as where the devisees are unborn; or such estate if it is hypothetically limited; unless there is some particular indication of a contrary intent, the limitation over, it is conceived, is a remainder, and not an alternative limitation, upon the principles involved in the first general rule above suggested, and also upon the principle, that "an estate tail," as Lord Hardwicke observed in *Brownsword v. Edwards*, "is capable of a remainder, and it is natural to expect a remainder after it." (a)

649 III. But, ^b if an estate in fee, simple or qualified, III. Where is taken by the ancestor or the issue, the limitation such estate over, as regards such estate, is an alternative limitation; because there cannot be a remainder after a fee simple (b), or qualified. See § 165.

(a) 2 Ves. Sen. 249. And see *Ives v. Legge*, 3 Durn. & East, 488, in note, as stated, Fearne, 276, 277. But see *contra*, *Keene v. Pinnock*, cited 3 Durn. & East, 495, and by Fearne, 379.

(b) See *Loddington v. Kime*, 1 Salk. 224, as stated, Fearne, 225, 373. *Goodright d. Docking v. Dunham*, Doug. 264, as stated, Fearne, 375. *Doe d. Comberbach v. Perryn*, 3 Durn. & East, 484, as stated, Fearne, 376. And also *Hockley v. Mawbey*, 1 Ves. 142; and *Doe d. Gilman v. Elvey*, 4 East, 313; stated § 530.

CHAPTER THE TWENTY-SECOND.

CERTAIN CASES OF CONDITIONAL LIMITATIONS, DISTINGUISHED FROM CASES OF MERE ALTERNATIVE LIMITATIONS; AND VICE VERSA.

SECTION THE FIRST.

Certain General Rules suggested.

Introductory We have seen in the first chapter, that, in doubtful cases, a limitation shall, if possible, be construed as a remainder, rather than an executory devise, whether of that kind which is termed a conditional limitation, or of any other. And, in the chapter next preceding the present, a rule has been suggested, that a subsequent limitation, in doubtful cases, ought to be construed as a remainder, if possible, rather than as an alternative limitation. It now remains to give some rules applicable to cases where a limitation is not construed as a conditional limitation, and yet it cannot be construed as a remainder, because the prior limitation carries the fee in real property, or the absolute interest in personal property.

I. Where the prior interest in fee is not vested and absolutely limited, and the subsequent limitation is an alternative.

1. Where the prior limitation carries the fee in real property, or the absolute interest in personal property, a subsequent limitation, in doubtful cases, ought to be construed as an alternative limitation, if possible, rather than as a conditional limitation, provided the prior limitation cannot fairly be construed to confer an interest vested prior to the event on which the subsequent limitation is to take effect, and an absolutely limited interest, either by reason of the form of its original limitation, (a) or of some subsequent explanatory expressions.

For, suppose the prior limitation to be executory in its original creation, but afterwards to confer a vested interest, it would seem that the subsequent limitation ought, in a doubtful case, to be construed, if possible, as an alternative, and not as a conditional limitation, in order that the estate of the persons taking under the prior limitation, who were the primary objects of the testator's regard, may not be defeated in favour of those claiming under the subsequent limitation, the secondary object of his regard. On

(a) See *Wall v. Tomlinson*, 16 Ves. 413.

the other hand, if the prior limitation never takes effect at all, it is clear that the subsequent limitation, even without the necessity of being construed as simply an alternative in its original creation, would be allowed to operate as an alternative, according to the doctrine stated in a subsequent chapter. See § 669, 671.

653 No rule to the effect of that above suggested has been laid down by authority; but, it would clearly appear to commend itself to reason and the analogy of law; and it would also seem to be exemplified in the cases of *Galland v. Leonard*, *Home v. Pillans*, *Monteith v. Nicholson*, and other cases cited in the present chapter, in support of other more specific rules.

654 The construction which leans towards holding a limitation to be an alternative rather than a conditional limitation, is sometimes aided by the doctrine of remoteness. For, where a limitation would be too remote, if it were held to be a conditional limitation, but not too remote, if held to be an alternative, it should, if possible, be construed an alternative, according to the maxim, *Ut res magis valeat, quam pereat*. See § 706.

A testator, after giving several life annuities, amounting to 270*l.* a year, proceeded as follows: "Which 270*l.* per annum, as the several life annuities fall in, I give and bequeath to my aforesaid trustees, for the use and benefit of the eldest surviving son of the aforesaid Sir J. M.; and, failing the male issue of the said Sir J. M., to the daughters of the said Sir J. M. living at the demise of such male issue, in equal proportions." And the testator disposed of the residue of his property in the following manner: "The remaining produce is to be enjoyed by my wife, M. M., during her natural life; and then, I give and bequeath the aforesaid sums, at her demise, to the eldest surviving son of Sir J. M., upon his coming to the age of 25 years; the interest arising therefrom, after the demise of my said wife, to be applied to the use of the said surviving eldest son, as to my trustees may seem most proper, till he comes to the age of 25 years, as before specified, or failing such male issue, to the daughter or daughters of the aforesaid Sir J. M., living at the time of the demise of the last of such male issue, in equal proportions." Sir J. M. had one son only, J. M., who died under 25, before any of the other annuitants, and did not leave any son. Lord Lyndhurst, on a petition of appeal as to the annuities, and on an original petition as to the residue, affirmed the decree of the Master of the Rolls, Sir John Leach, as to the former, and held, that the gift to the eldest son was not too remote; but that the eldest son surviving the widow, if there had been one, would have taken, whether born or unborn at the death of

See § 706,
714.

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II. Where the prior interest is vested and absolutely limited, and the subsequent limitation is a conditional limitation.
See § 200-9.

See § 128,
148-9.

See § 180.

the testator; and that such son would have taken a vested interest in the residue, on the death of the widow; because, the whole of the interest was given to him from her decease. And, for the reasons given below, His Lordship held that the limitation to the daughters was an alternative limitation to take effect if there should be no son surviving the annuitants, in the case of the annuities, and the widow, in the case of the residue, in favour of the daughters, living at the death of the son, or the last son who died in the lifetime of the annuitants or the widow. It was not a limitation to take effect after the enjoyment of another particular estate by the eldest son, either on his decease after the death of the widow, or on a general failure of his issue; in either of which cases it would have been too remote. It was not to take effect after a general failure of male issue. For, the testator only contemplated a personal benefit to such eldest son of Sir *J. M.* as should survive the annuitants, or, in the case of the residue, the widow; for, if the first son had died before the annuitants or the widow, leaving a son, the second son surviving the annuitants or the widow must have taken, in exclusion of the first son. And the testator could not have meant that the succession of the daughters should depend upon the failure of issue male who were not to take before the daughters. Besides, the gift was to the daughters living at the demise of such male issue. The failure he contemplated was to take place in the lifetime of the daughters; and the word demise is more referable to the death of an individual, than to the extinction of a whole line of issue. Nor was it to take effect on the death of the eldest son *after* the decease of the annuitants or the widow. For, had there been a son who survived the annuitants or the widow, he would have taken absolutely; and in no subsequent event could the property have then devolved upon the daughters.

II. But, where the prior limitation may fairly be construed to confer a vested interest before the event on which the subsequent limitation is to take effect, according to the form of its original limitation, or by reason of some other expressions; and it is limited absolutely, (and not hypothetically, in the event of such person's surviving the testator,) there, the prior limitation shall be construed to be vested, because the law leans in favour of giving a vested interest, especially to those who are the prior objects of the testator's bounty; and consequently, the subsequent limitation, unless dependent upon an event to occur at or before the testator's death, shall be construed a conditional, rather than an alternative limitation, because the construing it to be an alternative limitation, involves the necessity of construing the prior limitation to be either a contingent or an hypothetical limitation.

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Thus, where land is devised to a person when he attains 21, with a limitation over in case of his death under that age; there, if, upon the whole will, the prior limitation is capable of being construed to create a vested interest, it shall be so construed; and the limitation over shall consequently be construed a conditional, and not an alternative limitation.

And where a testator gave the interest of personality to *A.*, for life; and, after her decease, he gave the same to be equally divided amongst her three children, or such of them as should be living at her decease, the same to be paid to them at their age of 21 years. The three children all died in the lifetime of the tenant for life. Sir John Leach, V. C., held, that they took vested interests. He observed, that the vested interests first given by the will, were, by the form of the expression, only defeated in case there should be some or one, and not all, of the children living at the mother's death: but that event did not happen; for, there was not one child living, at the mother's death. And he said that the case of *Harrison v. Foreman*, 5 Ves. 207, was in point.

From these observations, it appears that he thought the words "or such," &c. constituted a conditional limitation. It is true, indeed, that he speaks of them immediately afterwards as "the alternative branch of the sentence;" but it must not be supposed from this, that he regarded that branch of the sentence as an alternative limitation. If the first words gave vested interests, as His Honour expressly declared they did, there could be no room for an alternative limitation: for, it would be contrary to the nature of an alternative limitation to operate so as to defeat the vested interests of the children, in the event he mentioned, or in any other event. The words would indeed admit of being resolved into a contingent limitation to the three children, if all three should be living at the mother's death; with an alternative limitation in case all should not be then living, to such as should be then living. But then, the children would only have had contingent interests at first; and as they all died in the lifetime of the mother, neither they nor their representatives would have taken any thing. And such a construction would have violated the rule, that an interest shall, if possible, be deemed to be vested rather than contingent.

Again; a testatrix being entitled to a sum of money charged upon her brother's lands, bequeathed the same to trustees, upon trust to pay the interest to two persons and the survivor; and, after the death of the survivor, to pay the principal to *B.*; but, if he should be then dead, then, to his two brothers, in equal shares, or the whole to the survivor of them. *B.* and his two brothers all died in the life-

Illustrations.

Sturges v. Pearson, 4 Mad. 413. And see also [335] *Belk v. Stack*, 1 Keen, 238. But see *Bil- lingsley v. Wills*, 3 Atk. 219; and *Smith v. Vaughan*, Vin. Ab. tit. "De- vise," 381, pl. 32; as stated, 1 Rep. Leg. 507, 511. Observations on *Sturges v. Pearson*. See § 128, 130, 148-9, 157..

Browne v. Lord Ken- yon, 3 Mad. 410.

time of *A.*, the surviving tenant for life. Sir John Leach, V. C., held, that the word "then" was to be applied not to the vesting, but to the possession. That the only question arose in the bequest to the two brothers, on the words, "or the whole to the survivor." That the obvious meaning was, that if one only survived the tenant for life, he should take the whole. And that it was therefore a vested gift to the two, as tenants in common, subject to be divested, if one alone should survive the tenant for life, but which never was divested, because that event did not happen.

Observations
on *Browne*
v. Lord
Kenny.
See § 136a.

It would appear, at first sight, that, in this case, there were a succession of alternative limitations; that *B.* was to take, if he were living at the death of the tenant for life; or the two brothers of *B.*, if he were not living at the death of the tenant for life, and the brothers were; or the survivor of the two brothers, if only one of them should be living at the death of the tenant for life. If *B.* had survived the tenant for life, he would have taken the absolute interest; for, the principal was to be absolutely paid over to him: and his brothers were only to take in the event of his not surviving the tenant for life. And hence it would at first sight seem impossible that they should take vested interests before the death of *B.* in the lifetime of the tenant for life: for, up to that time, there was a probability that the absolute interest might become vested in *B.*, to the entire exclusion of his brothers. And even after the death of *B.*, in the lifetime of the tenant for life, it may be thought that the brothers cannot be consistently regarded as taking vested interests, liable to be divested in the event of one alone surviving the tenant for life: for, if the representatives of the one who died in the lifetime of the tenant for life, were not to take, in the event of the other surviving the tenant for life, why should the representatives of either of them take, in the event of both of them dying in the lifetime of the tenant for life? Would not the same intention which would divest the moiety of one brother, in the first case, equally require that the entirety taken by the two brothers should go from them, in the latter case? Surely, then, (it may be argued) if both survived the tenant for life, they were to take the whole between them; if one alone survived, that one was to take the whole; if neither survived, neither were to take any. Such, indeed, would *prima facie* appear to be the true construction of the will. But, it is to be observed, that the law favours vesting; that the first words, "to his two brothers in equal shares," would, of themselves, confer a vested interest on the death of *B.*; and that the subsequent words, instead of serving to qualify the preceding words, so as to suspend the vesting, may fairly be considered as merely a short irregular way of expressing the same thing as if it

See § 99-103.

See § 96-9.

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See § 200-9.

had been said, "but in case of the death of either of them in the life of the prior taker, then, to the survivor;"^b which would have been a conditional limitation, and not an alternative; (b) and which would have been a species of limitation very common in such cases. And as to the above argument upon the intention, such would probably have been the intention, if there had been an ulterior limitation; but, in this case, the two brothers were the only more remote object of the testator's bounty, and the question of preference in his mind, lay between the representative of a deceased brother, and a surviving brother, and not between the representatives of the deceased brothers, and any other individuals.

The same point was established in another case where a *Bromhead* testator gave personal property to trustees, to be settled on *v. Hunt*, 2 the marriages of his daughters, for their separate use; and, *Jac. &* on their deaths, upon trust for their children; with a limitation over in the event of either of his daughters dying without having been married, or without leaving any children her surviving. *M. E.*, one of the daughters, had three children, of whom only one survived her; and he claimed the whole of *M. E.*'s share, insisting, that the vesting of the gift was suspended till the daughter's death, inasmuch as the representatives of none of the children of *M. E.* would have taken, if all the children had died before her; and it could not have been intended that the right of the representatives of those who died, should depend on the circumstances of one surviving *M. E.* But the Lord Chief Baron, assisted by two of the Masters, sitting for the Master of the Rolls, held, that the shares of the children of each daughter were vested, subject to be divested in the event of all dying before their mother; and there being one child of *M. E.* alive at her death, that the representative of the two other children who died before her, was entitled to their shares. The Lord Chief Baron remarked, that there was no limitation over in the event of *some* of the children dying in the lifetime of their mother; and if it were to be supplied, it could only be by inference. And he referred to *Skey v. Barnes*, 3 Mer. 335, and *Sturges v. Pearson*, 4 Mad. 411, as direct authorities for the principle on which the Court proceeded in the above decision.

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But where a testator gave all the residue of his real and *Howes v.* personal estate, in trust to sell, and invest the produce, and *Herring*, apply so much of the interest to dividends as might be necessary, for the maintenance of his five children, during their *You. 295.* minorities, and to accumulate the surplus for their benefit;

(b) See *Harrison v. Foreman*, 5 Ves. 207; *Deane v. Test*, 9 Ves. 147; *Davison v. Dallas*, 14 Ves. 576.

and, upon their severally attaining 21, to pay them 2500*l.* each; and, in case there should be any overplus, to pay and divide it unto and amongst all his five children, or such of them as should be living at the time when the youngest of them should attain 21, share and share alike. But, nevertheless, that in case any of his five children should die under 21, without issue, then, the share or shares of such child or children should go to the survivors or survivor. But, if any one or more should die under 21, leaving issue, then, his, her, or their share or shares should go to such their issue. One of the children attained 21, and died, leaving issue, but before the youngest child had attained 21. It was held, that the child so dying did not take a vested interest in the surplus of the testator's estate; and that her issue took no interest in such surplus; but that the whole of such surplus went to the surviving children of the testator.

Observations
on *Howes v.*
Herring.

In this case, a different construction was adopted, because the gift of the surplus was clearly contingent: for, not only did the words *primâ facie* import that the surplus was intended for those alone who should be living when the youngest child should attain 21; but it was uncertain till that period whether there would be any surplus, and, if any, what would be the amount thereof. (See *Gibbs v. Tait*, 8 Sim. 132, stated, § 597.)

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SECTION THE SECOND.

Certain Specific Rules as to the Period to which the Event of Death, when mentioned as if it were a Contingent Event, is to be referred.

I. Where

personal estate is limited over in case or in the event of death, and the death is held to be a death in the testator's lifetime.

See § 114.

See § 128.

136.

I. WHERE personal estate is given to a person 656 indefinitely or absolutely, "and in case of his death," or, "in the event of his death," to another; this disposition, though apparently constituting a gift of a life interest, with a *quasi* remainder, or, more strictly, a gift of the absolute interest, with a conditional limitation over to take effect on the death of the prior taker whenever it may happen, (see 168, 99—103, 148—158,) is, in the absence of all indications of a contrary intent, (c) construed to amount to an hypothetical limitation of the absolute interest, to take effect in the event of the person named as first taker surviving the testator, with an alternative limitation over, to take effect (d) in case of the death of the first taker in the lifetime of the testator, (d') unless there is a gift of a particular interest

(c) *Billings v. Sandom*, 1 B. C. C. 393; and *Nowlan v. Nelligan*, 1 B. C. C. 489; as stated, 2 Jarm. Pow. on Dev. 760.

(d) *Trotter v. Williams*, Pre. Cha. 78; S. C. 2 Eq. Ca. Ab. 344, pl. 2, as stated, 2 Jarm. Pow. on Dev. 759.

in the same property, antecedent to the gift to the person whose death is spoken of, or a mention of some period to which his death can be referred. Amongst other reasons mentioned in a subsequent page, this construction is adopted in order to satisfy the import of the words "in case," or "in the event of," which denote a contingency, whereas death at some time or other, and not at a given time, or under particular circumstances, is not a contingency, but a thing inevitable.

657 A testatrix gave to her sister, everything she had power to leave [which included leasehold premises and other personal estate], and, in case of her death, she then gave all she had to her mother. Lord Loughborough, C., held, on the authority of *Lowfield v. Stoneham*, 2 Str. 1261, that the words imported contingency, and that the sister was entitled absolutely.

Hinckley v. Simmons, 4 Ves. 160.

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The Lord Chancellor must therefore have considered the disposition as amounting to an hypothetical limitation to the sister absolutely, if she should be living at the death of the testatrix, with an alternative limitation to the mother, in case of the sister's death in the lifetime of the testatrix. It may be observed, that the opposite construction, that of the words referring to death at any time, was, in this case, extremely improbable, inasmuch as it was very unlikely that the mother would survive the sister, if the sister survived the testatrix, and continued to live as long as it might be supposed she would.

Observations on *Hinckley v. Simmons*.

Again; a testator bequeathed to his eldest sister, *M.*, 4000*l.*; and, in case of her death, to devolve upon her sister *C.* And he bequeathed to *C.*, 4000*l.*; and, in case of her death, to devolve upon her sister *M.* Sir W. Grant, M. R., held, that the words referred to a death in the testator's lifetime. His Honour observed, that the words had not in themselves, nor had they by construction received, a precise and definite meaning, in which they must be uniformly understood. That the expression was incorrect, either in not specifying the period to which the death was to be referred, if a contingency was meant, or else in applying words of contingency to an event certain, if they refer to death generally, whenever it may happen. (8 Ves. 21.) That the construction therefore must depend upon the intention. (*Ib.* 23.) That it was absurd to suppose that when *M.* died, her 4000*l.* was to go from her family to *C.*, and when *C.* died, her 4000*l.* was to go to *M.*'s family: and, to prevent that construction, the words "in the lifetime" of the other must be supplied, which would be departing from the construction of dying generally, and so far giving way to the argument of the other side. (*Ib.* 24.) And then [even if these words were to be supplied, still] during their joint lives,

Cambridge v. Rous, 8 Ves. 12.

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neither could touch a shilling; and if one died leaving children, her share could not have been used for her family, but would have gone to her sister for no other reason but that she happened to survive. (*Ib.* 23.)

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Slade v. Milner, 4 Mad. 144.

And where a testatrix made the following bequest: "to *M. S.*, 2000*l.* stock; and, in case of her death," the said 2000*l.* shall then be equally divided between her children. She also made other bequests in similar terms. And after disposing of the residue, she added the following direction: "in case these my residuary legatees shall have departed this life before me, and consequently before this will takes place, it is then my will that the aforesaid residuum . . . shall then be equally divided between" &c. It was argued, that *M. S.* took an estate for life only, with a remainder to her children, inasmuch as it appeared that when the testatrix intended to make a bequest over in the event of the legatee dying before her, she distinctly said so. But Sir John Leach, V. C., held, that the words, "in case of her death," referred to a dying before the testatrix; and that as *M. S.* survived the testatrix, she took absolutely. He observed, that the interest of the legatee was not limited to her life; and that "in case of her death" imported contingency, or death which might or might not happen before another event. And that the residuary clause only showed that the testatrix had in her contemplation the possibility that the legatees might die before her.

Ommaney v. Bevan, 18 Ves. 291.

So where a testator gave his residuary real and personal estate in trust for *A. P.*; and, in case of her death, to be equally divided between the children of *W. W.*, *A. P.* survived the testator, and then died; and Sir W. Grant, M. R., decreed payment to her executor, as having taken the absolute interest.

Crikan v. Baines, 7 Sim. 40.
See also *Child v. Giblett*, 3 M. & K. 71.

So also where a testatrix bequeathed 4000*l.* to *A.*; and, in case of his decease, she gave the same to his wife; and, at her decease, to their eldest daughter. Sir L. Shadwell, V. C., held, that *A.*, having survived the testator, was absolutely entitled to the legacy.

In another case, however, it was considered that the testator intended the gift over to take effect at the death of the legatee, whenever it might happen; and therefore it was construed accordingly. In that case, a testatrix bequeathed all the residue of her personal estate, in trust for, and to the use and behoof of, her daughter, Lady *D.*; and, in case of her decease, to the use and behoof of her children, share and share alike, to whom her trustees and executors should account for and assign the said residue. And, by a codicil, she declared, that she would have her wearing apparel given to her housekeeper, *M. M.*, or, if she should be dead before the testatrix, to have these things divided between

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Lord Douglas v. Chalmer, 2 Ves. Jun. 509.

whoever is in her place, and the testatrix's chambermaid. Lord Loughborough, C., held, that Lady *D.* took only a life interest, and, at her decease, the children were to take the capital. His Lordship observed, that, taking the words by themselves, such a gift naturally implies that kind of disposition, and that it would be much too subtle to make a different construction from that which would arise from the words, "at her decease," or "from her decease." He also adverted to the fact, that the codicil expressed the very contingency upon which the limitation to the children was supposed by the plaintiffs to depend. And His Lordship concluded by saying, that if he were to adopt the other construction, the whole residue would vest in Lord *D.*; the children could not take by Lady *D.*'s gift; for she could have no power to give it; nor could they take as representatives of her, nor as sole representatives of Lord *D.*; for he had other children by a former wife. On a subsequent day, the matter was reheard, but the Lord Chancellor adhered to the same opinion.

658 II. Where there is a gift of a particular interest in the same property, antecedent to the gift to the person whose death is spoken of, the death, in the absence of all indications of a contrary intent, is construed to be a death in the lifetime of the first taker, whether subsequent or prior to the death of the testator. II, Where personal estate is so limited over, and the death is held to be

A testatrix gave personal estate, in trust for *E. T.*, for life; and, after the death of *E. T.*, she gave the same to the three children of *E. T.*, to be divided among them, in equal shares; and, in case of the death of either of them, the share of such of them as may die to go to the children of the persons so dying. It was held, that one of the children, who died in the lifetime of *E. T.*, took a vested interest, subject to be divested by his death in the lifetime of *E. T.*, the tenant for life, leaving issue; and consequently his share belonged to his children, and not to his personal representatives. *Hervey v. M'Laughlin*, 1 Pri. 264. [343]

Again; a testator bequeathed his leasehold and other personal estate to his wife; for life; and, after her death, to a trustee, in trust to pay the rents and profits for and towards the support and maintenance of his six nephews and nieces; and, in case of the death of any of them, for the support and maintenance of the survivors. Sir L. Shadwell, V. C., held, that the words referred to a death in the lifetime of the tenant for life; and that a niece who died after having survived both the testator and the tenant for life, had become absolutely entitled to one sixth of the property. *Clarke v. Gould*, 7 Sim. 197.

And where a testator gave all his copyhold and leasehold property, and all other his property, to his wife, for life; and, at her decease, he directed it to be sold, and to be divided *Le Jeune v. Le Jeune*, 2 Beav. 701.

into five equal shares, one of which he directed to be paid to each of four sons that should be living at the time of her decease. And, in case of either of their deaths, then, the share of such so dying to be paid to his issue. Lord Langdale, M. R., held, that the child of a son who died in the testator's lifetime was entitled to his share; His Lordship observing, that the words, "in case of either of their deaths," might be referred to any time prior to the death of the tenant for life, even though the time should be in the lifetime of the testator himself.

Smith v. Smith, 8 Sim. 353.

This construction is supported by another case, where the death was *expressly* a death in the lifetime of the wife, who was tenant for life of the residue. The words were: "provided that in case any of my children, who shall happen to die in the lifetime of my wife, shall have left issue" &c. And Sir L. Shadwell, V. C., held, that the case of *Thornhill v. Thornhill*, 4 Mad. 377, was wrong; and that the issue of a child who died in the wife's lifetime, prior to the testator's decease, was entitled to a share.

Giles v. Giles, 8 Sim. 360. [344]

In the case of *Giles v. Giles*, the testator, at the date of his will, had but one daughter; but he had had another daughter, and she left issue, who survived him: and Sir L. Shadwell, V. C., held, that such issue was entitled to a share in the residue. And though this decision was grounded on the special reason, that it appeared from the word "daughters," as used in one passage of the will, that the testator was contemplating a provision for the issue of more than one daughter; yet, the learned Judge observed, that it may be reasonably supposed, that the testator intends as much to provide for his grandchildren, by a child then living, but which may thereafter die.

III. Where personal estate is so limited over, and the death is held to be a death at some other period.

III. Where, indeed, the will furnishes any other period besides the death of the testator, to which the death of the legatee can be referred, it will be held, in the absence of indications of a contrary intent, to mean a death before such other period; rather than a death generally at some time or other, and indeed rather than simply a death before the testator: (c) because, it is more natural for a testator to provide against the death of a legatee before some event which may and probably will happen subsequent to his, the testator's, own decease, than for him simply to provide against the legatee dying before himself. And if the death is construed to mean a death at a period prior to the vesting of the interest in the party whose death is spoken of, the gift over is an alternative limitation; but if it means a death at a period subsequent to the vesting of such interest, it is a conditional limitation.

See § 128-136.
See § 148-158.

(c) See *Home v. Pillans*, 2 M. & K. 15, stated, § 663.

661 IV. Where the gift over is introduced by the words "if he should die," or by the words "or in the gift over case," or by the words "but in case," instead of the words "and in case of his death," the intention to refer to a death by other in the testator's lifetime, or at some other particular period, instead of death generally whenever it may happen, is still more clear. contingency.

A testatrix gave to her son, when he had attained 23, certain sums of stock, and also household goods &c., and to her daughter, certain other sums of stock, and the testatrix's wearing apparel. And she willed, that if either of her children should die, the surviving child should have what she had left to the other. The daughter survived the testatrix, and then died, leaving the son surviving. It was argued, that the clause of survivorship referred to the event of death in the testatrix's lifetime: for, it was impossible that the linen, wearing apparel, and china, were intended to be used only, without any absolute interest in them, till the death of one of the children; and it was not likely that the testatrix would have fixed the age of 23, in the bequest to the son, if she intended each child should have only the interest till the death of one of them. And Sir R. P. Arden, M. R., held, that the clause did refer to the case of lapse by death in the testatrix's lifetime. He remarked, that the words were, "if either should die," and not "in case of her death;" as in the cases of *Billings v. Sandom*, and *Nowlan v. Neligan*, 1 Bro. C. C. 393; 398. That the reasons for decision in *Lord Douglas v. Chalmers* did not apply to this case. And that in *Billings v. Sandom*, there was nothing, upon the face of the will, to restrain the construction to dying in the life of the testator, which would not be supposed to be the intention, unless there could be no other. But, the present case, His Honour added, was exactly like *Trotter v. Williams*, Pre. Ch. 78; and the construction that the words meant, whenever the death of either should happen, would be totally inconsistent with the rest of the will; and therefore, there was an absolute interest in the daughter, at the death of the testatrix, and in the son, at 23.

So where a testator bequeathed a sum of stock to his nephew, *R. D.*, then or then lately residing in India, or, in case of his death, to his lawful issue; but, if his nephew should be deceased at the time of his death, without leaving any lawful issue, then, he bequeathed to *J. T.*, or, in case of his decease, to his lawful issue, part of the stock. Also, in like manner, he bequeathed another part to *R. T.*, or his lawful issue. Also, in like manner, he bequeathed another part to *M. R.*, then or then lately residing in the town of Leith, or, in case of his death, to his lawful issue. The Master stated his opinion to be, that *R. D.* died in the testatrix's lifetime. *King v. Taylor*, 5 Ves. 806.

So where a testator bequeathed a sum of stock to his nephew, *R. D.*, then or then lately residing in India, or, in case of his death, to his lawful issue; but, if his nephew should be deceased at the time of his death, without leaving any lawful issue, then, he bequeathed to *J. T.*, or, in case of his decease, to his lawful issue, part of the stock. Also, in like manner, he bequeathed another part to *R. T.*, or his lawful issue. Also, in like manner, he bequeathed another part to *M. R.*, then or then lately residing in the town of Leith, or, in case of his death, to his lawful issue. The Master stated his opinion to be, that *R. D.* died in the testatrix's lifetime. *Turner v. Moor*, 6 Ves. 556.

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tator's lifetime, unmarried. Sir W. Grant, M. R., (after adverting to the circumstance, that the will was made eleven years after *R. D.* had sailed on a voyage in which in all probability he perished;) as a reason why the testator expressed himself with more particularity as to *R. D.*, observed, that the testator having clearly expounded his meaning in one instance, must be supposed to have the same meaning by the same words in the other parts; and that, in the present case, it was clear that the parent and the children were not both to take, but either the parent or the children in the alternative; whereas, in *Billings v. Sandom*, and in *Lord Douglas v. Chalmer*, the word "and" was used, showing that both were to take—the parent and the children.

Webster v.
Hale, 8 Ves.
410.

And where a testator gave a sum of stock, in trust for the use, exclusive right, and property of his sister *C.*; but, should *C.* happen to die, then the stock was to be divided among *C.*'s children. And he bequeathed to her another sum, to be paid to her as soon as possible; or, in the event of her death, the said sum was to be divided among the children. He also bequeathed to his sister, *H.*, a sum of stock; and, in case of her death, the sum was to be divided among her children. Sir W. Grant, M. R., held, that the limitations to the children were alternative dispositions, the word "but" being used in the first bequest, and that word being disjunctive and adversative, opposing one case to another; the word "or" occurring in the second, as well as a previous direction for payment, strongly implying entire and absolute property; and it being by no means probable, as to the third bequest, that the testator meant to make any difference between *H.* and her sister.

Smart v.
Clark, 3
Russ. 365.

In another case, however, it clearly appeared to be the testator's intention that the gift over should take effect on the legatee's death, whenever it might happen; and therefore it was construed accordingly. In that case a testator bequeathed as follows:—"I give to my son *E. C.*, who is now at sea, the interest of 500*l.* stock, during his life, if he comes to claim the same within five years after my decease; but, if he should die, or not come to claim the same within the time limited, then, I give the said stock to the children of my daughter *Ann Smart*, with all the interest that may be due thereon." The residue of his estate he bequeathed to his four daughters. *E. C.* came and claimed the stock within the five years, received the dividends during his life, and died after the five years had elapsed. The Lord Chancellor, on the authority of *Billings v. Sandom*, 1 Bro. C. C. 394, held, that the children of the daughter were entitled, though *E. C.* did not die within the five years. The word "if," as *prima facie* importing a contingency, would, at first sight, seem to show that the children of the daughter

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were only to take if *E. O.* should die within the five years. But, as their counsel remarked, "the testator was naturally drawn into the use of an expression importing contingency; because one event for which he was providing, namely, that of *Edward* not claiming the legacy within five years, was contingent."

662 V. Even where the gift over is not merely de- V. Where pendent on the simple event of death, but is to the gift over take effect "in case of the death leaving children," or "in case of the person "dying unmarried and without issue," (f) on the event the event will be construed to mean, not a death generally of death. at some time or other, but a death in the testator's lifetime, or at some other particular time, if the fund or property itself, and not merely the interest or income is given "absolutely" to the person whose death is spoken of; or, if it is not to vest till a future period, and the dying may fairly be referred to a dying before that period; or if, for any other reason, it does not appear that the testator intended to refer to death generally.

663 In these cases, the difficulty of this construction Grounds of is much greater; because, the event not being, as the rule. in the other cases, simply the death of the legatee, but being in fact entirely contingent, it is unnecessary, for the mere purpose of satisfying its contingent import, to construe the event to mean a death at any particular time. But, such a construction is considerably aided by the policy of the law, which ought to lean in favour of the primary objects of the testator's bounty, and also favours the absolute enjoyment [348] and the transfer of property, which would be prevented by See § 223-6. the opposite construction.

In a case of a residuary devise of real and personal estate, *Doe d. Lif-* the words, "in case of the death," were held to refer to *for v. Spar-* death in the lifetime of the testator; the testator having ex- *row*, 13 pressly confined some of the limitations to the event of a *East*, 359. death in his lifetime; from which, and for other reasons, it might be inferred that he was contemplating a death in his lifetime in the preceding clause, when he spoke of the death of either his son or daughter, leaving issue.

And where testator gave personal estate, in trust to pay *Galland v.* the interest to his wife, for life; and, upon her death, to pay *Leonard*, 1. and divide the trust monies unto and equally between his *Swans*. 161; daughters, *H.* and *A.*, for their own use and benefit abso- *S. C.* 1. lutely; and, in case of the death of them, or either of them, *Wils.* 129. leaving a child or children living, to apply the interest for the maintenance of the children till 21, and then, to divide the trust money amongst them; his will being, that the child or children should be respectively entitled to the same share

(f) *Laffer v. Edwards*, 9 Mad. 210, stated § 136a.

his her or their mother would be entitled to if then living; and upon this ultimata trust, that, in case of the death of his said daughters, without leaving issue living at their respective death, in the event also happening of all their children dying minors, then to pay and divide the trust monies among his nephews and nieces then living, for their own use and benefit absolutely. Sir Thomas Plumer, M. R., after observing that the fund itself, and not merely the interest, was given to the daughters, and given "absolutely," held, that the testator meant, that if his daughters survived his widow, they should take the absolute interest; but that if they were not then living to enjoy his property, it should pass to their children, if they left any; or, if they died without children, to his nephews and nieces: a construction that reconciled every part of the will, and was borne out by the expression of the testator's intention, that the children should take the same share to which their mother would have been entitled "if then living."

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*Horne v. Pil-
lans*, 2 M.
& K. 15.

Again; where a testator gave to his two nieces, 2000*l.* each, when and if they should attain 21, for their sole and separate use; and, in case of the death of his said nieces, or either of them, leaving children or a child, he gave the share or shares of such of his said nieces or niece so dying, unto their or her respective children or child. The Master of the Rolls held, that the interest of the nieces did not become absolute on their respectively attaining 21, but continued to be subject to an executory bequest over, in the event of their leaving children living at their death. But Lord Brougham C., on appeal, reversed that decision; and held, that the nieces took an absolute interest in their legacies, on attaining the age of 21 respectively. "It may be stated," said His Lordship, "as a general proposition, that where the bequest over is in case of the legatee's death, and no other reference can be made, the period taken is the life of the testator; but where another can be found, that will be preferred, [inasmuch as the maker of a will does not naturally provide for the event of his surviving his legatees, the selected objects of his posthumous arrangements.] (2 M. & K. 22.)" A preceding gift for life, or other interest less than the absolute property, will furnish this reference. But this is not the only means of restricting the generality; and a direction that the gift shall vest at a given time, affords just as easy and as natural a reference as a preceding life interest. Thus, a bequest to *A.*; and, in case of his death, to *B.*; is a gift absolute to *A.*, unless he dies in the testator's lifetime. A bequest to *C.* for life; and then to *A.*; and, in case of his death, to *B.*; is a gift absolute to *A.*, unless he dies during *C.*'s life. A bequest to *A.*, when and if he attain the age of 21; and, in case of his death, to *B.*; is a gift absolute to *A.*, unless he

dies under age." (*Id.* 22, 24.) "In the present case, no period can be derived from any prior life estate, at the determination of which the gift over is to take effect. But the whole clause taken together furnishes a period for the restriction, at once natural, and obvious, and consistent with the plain meaning of the testator, and peculiarly agreeable to the frame of the bequest. He first gives his nieces the monies when and if they shall attain 21; at the age of majority, therefore, the legacies vest; and, as far as this branch of the clause goes, vest absolutely. . . . If we read the latter part as contemplating a dying at any time, and as converting the legatee's interest, from an absolute interest in the capital sum, into a life annuity, in the event of her leaving a child at her death; we entirely destroy the first part of the clause, which provides for the interest vesting at 21. According to this construction, she has attained her age of 21 in vain [as regards the capital]: for, at that period so anxiously pointed out by the will, as the time when she was to receive the sum of 2000*l.*, she only acquires the chance of her will operating upon it in case she dies childless. During all the days of her life, she has no more control over it after 21 than she had before. It appears quite clear to me that the other construction is the sound one. Having first provided for the legacy vesting when the legatee is of age, and secured it against the interference of others, in the event of marriage; the testator provides for the case of the legatee dying under age and leaving a child or children: in that case, they take their mother's legacy, because she did not live till it vested in her. (*Id.* 25, 26.)

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See § 228-6.

And so where a testator bequeathed his personal estate to his brothers and sisters absolutely, and declared, that if any of them should die in his lifetime, or afterwards, without leaving issue him surviving, his share should go amongst the survivors; and that if any should die in his lifetime, or afterwards, leaving issue him surviving, his share should be divided among his issue; such child or children taking their parents' share. And he declared it to be his will that none of the legatees should be entitled to any bequest until they attained 21. The brothers and sisters claimed the absolute interest. The child of one of them insisted that they took a life estate only. Lord Langdale, M. R., held, that each legatee took an absolute vested interest on attaining 21, and the limitation to the issue was to take effect only in the event of the legatee dying under 21.—There was in effect a limitation to the brothers and sisters, if and when they attained 21; followed by two alternative limitations; namely, a limitation to the survivors, if one or more of the brothers and sisters should die under 21, without leaving issue, or, to the issue of him her or them so dying, if he, she, or they should leave issue.

Monteith v. Nicholson,
2 Keen, 719.

Observation
on *Monteith v. Nicholson*.

See § 128-130a.

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VI. The same construction seems applicable to real estate. VI. It would seem that this qualifying construction is equally applicable to real estate. 664
 Exception. There is however an exception to this: for, "it seems that where a testator devises an estate tail to a person; and if he died, over; the words 'without issue' are supplied, to render it correspondent with that estate;" (g) a construction which does not militate against the application of the rules above laid down to real estate, but is merely an illustration of the rule stated in the twenty-first chapter, that a limitation shall, if possible, be construed a remainder, rather than an alternative limitation. 665

Decision to the contrary. It has been decided, indeed, that the rules above stated do not apply to real estate, where the words, "in case of the death," follow an indefinite devise. 666

But perhaps that decision may be thought to have been based upon reasons which do not constitute any solid distinction in this respect between real and personal estate; and at any rate they do not apply to wills which have been made since the beginning of the year 1838, and which are governed by the stat. 1 Vict. c. 26, s. 28.

In that case, a testator gave one third of his real estate, to his sisters, share and share alike; and, in case of their demise, he devised their respective shares or proportions to be equally divided amongst their children, or their lawful heirs. Alderson, B., held, that the sisters took estates for life only, with remainder to their children, as tenants in common in fee. It was argued, that the limitation to the children was an alternative, to take effect in case of the demise of the sisters in the lifetime of the testator. But the learned Judge said, that many cases to this effect were cited; but they were all cases of personal property, and not of devises of land. That there was an obvious distinction between the two: a bequest of personal estate to A. gives him the whole interest. A devise of land to A. gives him only a life interest. That, in the former case, therefore, the words in case of their demise preceding a bequest over, cannot well have their proper effect, except by considering them as applicable to a bequest over as a substitution for the previous gift, in case the party to whom it is given should not survive the testator. But that, in the case of land, the most natural meaning of the words (which seemed to him to be after their demise) may very reasonably have its full effect.

Bowes v. Scowcroft, 2 You. & Coll. 640.

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Observations With the utmost deference for so great an authority, it on *Bowes v. Scowcroft*. may perhaps be fairly questioned, whether the distinction taken by the learned Judge is altogether satisfactory. There is no doubt but that the Court is only desirous of giving

(g) 2 Jarm. Pow. on Dev. 764; and *Anon.*, 1 And. 33; there cited.

effect to the real intention of the testator, in regard to the words in question; and that if it appeared clear, from any other expressions, that the intention was, to guard against lapse, that intention would be effectuated, as much in regard to real estate, as to personal. The only question, then, seems to be, whether there is any distinction between real and personal estate in point of intention? But the distinction adverted to by the learned Judge is one which arises, as was urged at the bar, from construction of law, and is at variance with the real intention, and is abolished by the Statute 1 Vict. c. 26, s. 28, on that account, so that a devise of land to *A.* indefinitely, will now pass a fee, "unless a contrary intention appear by the will." The learned Judge indeed did not allude to it as affording any clue to the intention, but in relation to the effect which the words in question have upon the previous disposition. Now with respect to that, it may be replied, that the cases of personal property have been expressly decided upon what has been considered the grammatical meaning of the words "in case of" &c.; as importing a contingency instead of an event certain, and not with any regard to the quantity of the preceding interest. Indeed the bequest to *A.* gives the whole interest, only because it is not restricted by any subsequent words. If the testator adds "and after the demise of *A.*, then, to the children of *A.* absolutely," those words would have their proper effect, by restricting *A.* to a life interest. And so, if the subsequent limitation had been introduced by the words "and in case" &c., instead of "and after," &c., the effect would have been the same, if it had been considered that those words did not properly import a contingency. So that the quantity of the previous interest is, in one sense, dependent upon the intrinsic meaning of the words "and in case" &c., introducing the subsequent limitation, instead of the meaning or operation of those words being dependent upon the quantity of the preceding interest. In many cases, if not in all, where the words are, "and in case" &c., and not "or in case" &c., or "but in case" &c., perhaps the real meaning is that which is not the grammatical one. And, so far as the present decision is concerned, such would seem to be the case. For, if the testator had meant to refer to the event of lapse, he would have said "in case of the demise of either or both of them;" for, it was not a very improbable event that one should die in his lifetime; but that both should die in his lifetime was very improbable; and yet, that is the event he contemplated, if the words refer to lapse. On this ground, the decision itself in this case appears to be perfectly sound: but yet, notwithstanding this decision, it may not be considered a settled point; that there is a distinction in this respect between real and personal estate, even as regards wills made before the year 1838.

CHAPTER THE TWENTY-THIRD.

CERTAIN CASES OF VOID CONDITIONAL LIMITATIONS, DEPENDING ON THE NON-DISPOSAL OF PROPERTY, DISTINGUISHED FROM LIMITATIONS IN DEFAULT OF THE EXERCISE OF A POWER.

If property is limited to such uses as a person 667 shall appoint, and, in default of appointment, to other uses, this, as it is well known, is good as a power of appointment, with a limitation in default of the exercise of the power.

But, if property is limited directly to, or to the use of, a person, instead of being limited to uses to be appointed by the exercise of a power; it cannot be limited over in the event of such person not exercising that power over it with which he is clothed by the law itself, as an incident to property.

Ross v. Ross, 1 Jac. & Walk. 158.

See also other cases cited in the Reporter's note.

A testator bequeathed a sum of money to *A.*, to be paid at 25, or between 21 and 25, if the executors should think proper; and directed maintenance thereout in the meantime; and that in case *A.* should not receive, or dispose of, by will or otherwise in his lifetime, the aforesaid sum, then, the said sum should return, and be paid and payable to another person. *A.* attained 25, and died. He did not receive the legacy; but the amount had been carried to his separate account, in a suit to which he was not a party. Sir Thomas Plumer, M. R., held, that the limitation over was void. He observed, that the case differed from a power, and a remainder over in default of its exercise: the right of disposing of the legacy was given him not *in terminis*, but as a consequence of property: it was not given as a power, but followed from the property being his. That the testator assumed that he would have a right to it at 25; and if absolute property be given to a person, it cannot be subjected, for his life, to a proviso, that if he does not spend it, his interest shall cease. One of the consequences would be, that if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it.

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Cuthbert v. Purrier, Jac. 415.

And where a gift was made by will to the testator's natural son, to be paid to him at 21, with a bequest over in the event of his dying under that age, or afterwards, without lawful heirs, and intestate; it was held, that the limitation over was not good, on the ground that a person, after investing another with the absolute property, cannot give it

over in the event of the legatee's not exercising that power which is incident to and a consequence of property. The case of *Ross v. Ross* was referred to by the Master of the Rolls, as decisive of the point.

CHAPTER THE TWENTY-FOURTH. [356]

LIMITATIONS OPERATING DIFFERENTLY, IN REGARD TO ANOTHER LIMITATION, IN DIFFERENT EVENTS.

668 I. AN interest may be specially limited to take effect either as an alternative, in case a prior interest should never vest, or as a remainder or *quasi* remainder after it. (See § 128, 159—168b.)

668a II. And even where an interest might appear, at first sight, to be a mere alternative, it shall be construed as a remainder or *quasi* remainder, if possible, as well as an alternative. (See § 128—136a, 159—168b.)

Thus, where a testator devised to two trustees and their heirs, to receive the rents until *B.* should attain 21; and if *B.* should attain 21 or have issue, then to *B.* and the heirs of his body, but if *B.* should happen to die before 21 and without issue, remainder over; *B.* attained his age of 21, and afterwards died without issue. Lord Hardwicke decreed that the limitation over should take effect. The great authority upon this subject observes, "that Lord Hardwicke construed the word "*and*," in the limitation over, as "*or*." (a) But, in reality it would clearly appear that His Lordship regarded the limitation over as both a remainder and an alternative; and he does not appear to have construed "*and*" as "*or*," but to have supplied an ellipsis, so as to make the limitation over capable of taking effect on a failure of issue of *B.* after 21, and yet, at the same time, to have prevented the limitation over from taking effect, to the exclusion of *B.*'s issue, if *B.* had died under 21 leaving issue. His words are these: "Having first given the whole legal fee to trustees and their heirs, he did not intend either of these two children should have anything vested till 21, or the having issue; and then to have an estate tail: consequently, as soon as *John* [*B.*] attained 21, or had issue, though he died before 21, that defeated and determined the estate in law given to the trustees and vested a fee tail in

I. An interest limited as an alternative or as a remainder or *quasi* remainder.

II. An interest shall, if possible, be construed as a remainder or *quasi* remainder, as well as an alternative.

Brownson v. Edwards, 2 Ves. 243. See also *Southby v. Stonehouse*, 2 Ves. 610, as stated, *Fearne*, 507.

(a) *Fearne*, 506.

him. He did attain 21; and therefore had an entail as he would if he died before 21; but had issue. Then the construction could not be, as insisted for the plaintiff, as with a double aspect; if he attained 21, then to vest in him an estate; or, if he died before, leaving issue, then to give it to that issue: that is not the construction: but it is, to give an estate tail in either event. . . . There is a plain natural construction upon these words: viz. if the said *John* [*B.*] shall happen to die before 21, and also [*or, and if he*] shall happen to die without issue: which construction plainly makes the dying without issue to go through the whole, and fully answers the intent."—If "and" had been construed "or," the dying without issue would have had no reference to a dying under 21; and if *B.* had died under 21, leaving issue, the estate must have gone over, to the exclusion of such issue, contrary to the express words, and the clear intent, as Lord Hardwicke thought, of the testator.

Doe d. Usher v. Jessep, 12 East, 288, distinguished from *Brownsword v. Edwards*.

The case of *Doe d. Usher v. Jessep* may at first sight appear to clash with *Brownsword v. Edwards*. In *Doe d. Usher v. Jessep*, *A.* devised to trustees and their heirs in trust for his natural son *J.* and the heirs of his body; and if *J.* should die before he attained his age of 21 years, and without issue, then over. *J.* attained his majority, but died without issue. The case of *Brownsword v. Edwards* was cited: but the Court refused to give effect to the devise over. The fact is, that this case was essentially dissimilar. The language of the limitation over was indeed perfectly similar to that of the limitation over in *Brownsword v. Edwards*. But the prior interest in *Doe v. Jessep* was a vested interest, whereas the prior interest in *Brownsword v. Edwards* was contingent upon attaining 21, or having issue. And hence the limitation over in *Doe v. Jessep* was a conditional limitation.

See § 148-9, 157.

III. Every remainder or quasi remainder has the effect of an alternative limitation, in case the preced-

III. ^b Every remainder or quasi remainder, without being specially limited for that purpose, has the effect of an alternative limitation, in case the preceding interest never vests at all, whether the failure of such preceding interest arises from the death of the prior taker in the lifetime of the testator, or from the failure of the contingency on which it depended; unless such contingency, either according to the grammatical construction or the apparent intention, extends to the remainder or quasi remainder also; (b)

(b) See *Chatteris v. Young*, 6 Mad. 30. See also *Horton v. Whittaker*, 1 Durn. & East, 348; *Davis v. Norton*, 2 P. W. 390; and *Doe d. Watson v. Shipphard*, Dougl. Rep. 75; *Scatterwood v. Edge*, 1 Salk. 229; and Lord Hardwicke's remarks in *Avelyn v. Ward*, 1 Ves. 420; as stated, Fearn, 235—237; and the limitation to *V.* in *Vachel v. Vachel and Lemmon*, 1 Chan. Cas. 129, as stated, Fearn, 404.

and unless there is some other condition which constitutes a prerequisite to the vesting of the remainder or *quasi* remainder, and such condition is not fulfilled.

In the following case the condition extended to the remainder.

A testator devised real estates, upon trust that his daughter *M.* should, until 21, if sole and unmarried, receive thereout, an annuity of 60*l.*, and that she should thereafter, and until 31, if sole and unmarried, receive a further annuity of 40*l.*; but, in case his daughter should marry without the consent of his trustees, then, she should receive only an annuity of 50*l.*, and the said estates should, immediately upon such marriage, be in trust for the children of *M.*, as tenants in common in tail; and, for default of such issue, in trust for the testator's sister, *S.*: provided that, if *M.* should marry with the consent of the trustees, it should be lawful for them to settle the estates upon *M.* and her husband, for their joint lives, and the life of the survivor, with remainder to the issue of *M.* &c. *M.* married with consent, and died without issue. The Court, on a rehearing, reversing its former decision, held, that as *M.* married with consent, the remainder to *S.* failed, though *M.* died without issue. The Lord Chief Baron considered the words, "and for default of such issue," as referring to the issue of the children, and the limitation to *S.*, as a remainder depending on an estate tail (1 Y. & C. 636-7); and he was of opinion that the condition upon which the estate tail was limited, clearly applied to the limitation to *S.*, upon the words of the instrument as they stood (*Ib.* 639); and that the Court could not, by anything but a probable conjecture, which it had no right to act upon, insert the proviso immediately before the limitation over of the remainder to the sisters (*Ib.* 642). There was one case in which the testator had clearly omitted to make any provision for his sisters, namely, in the event of the daughter never marrying at all. And His Lordship asked, why the other case might not be ranged under the same class, either of a design to die intestate, or of a *casus omissus* (*Ib.* 641).

Immediately after stating his opinion to be that the condition extended to the limitation to *S.*, His Lordship added another reason for the failure of that limitation, apparently treating the failure thereof as a necessary consequence of the total failure of the estate tail on which it depended; but His Lordship's words are ambiguous, and probably were either inaccurately reported, or not intended to convey the meaning they apparently convey. Admitting that the limitation to *S.* is not simply an alternative, amounting to a limitation to *S.* for default of such children, but a remainder, to take effect on the expiration of the preceding estate tail; yet we have seen that every remainder has the effect of an alternative limitation, in case the preceding interest never

interest never vests.
See § 159,
168, 128-
136a. i

Tolderoy v. Colt, 1 You. & Coll. 621.

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Observations on *Tolderoy v. Colt*.

See § 669.

takes effect at all; unless, as in this case, the contingency on which the preceding interest depends, affects the remainder. —In this case, there was, first, in the event of the daughter marrying without consent, the limitation of a springing interest to the daughter's children in tail, with a remainder to *S.*, that is, a remainder in relation to the preceding limitation, but a limitation of a springing interest, when viewed in relation to the absence of a present particular estate. But, secondly, in the event of the daughter marrying with consent, there was an alternative limitation to her and her husband for their joint lives &c. As soon as the daughter married with consent, the first two limitations became incapable of taking effect; and the third limitation at once took effect, as an alternative for them, in consequence of the happening of the second-named event, instead of its opposite, the first-named event.

See § 117-127a, 159.

See § 128-136a.

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Consequence of the above rule, as regards chattels which are to go to the persons entitled to real estates entailed.

As a consequence of the rule last stated, it follows, that * where a testator, after creating contingent estates tail in real property, with a remainder over, directs, that personal estate shall go to the persons entitled to the real estate, as far as the rules of law or equity will permit; in such case, as the limitation in remainder is capable of operating as an alternative, as regards the real estate, in case the contingent estates tail never vest; so the limitation over shall also enure, in that event, as an alternative limitation of the personal estate in favour of the individual entitled to the real property under the same; (c) though it could not pass the personal estate to him, if the contingent estates tail had become vested, and the remainder were consequently to take effect, in regard to the real estate, as a remainder; because personal estate, as we shall see hereafter, cannot be limited in remainder after an indefinite failure of issue.

See § 719.

Instance of remainder taking effect as such, though taking as an alternative as regards the possession.

Where a prior interest vests in the first instance, or afterwards becomes vested in right, a subsequent limitation in remainder takes effect even though such prior interest never becomes vested in possession. But then, such subsequent limitation takes effect, as a remainder, after the prior interest has vested, in interest, but has regularly expired before it could become vested in possession: it does not take effect, as an alternative limitation, simply as a substitute for a prior interest which has never taken effect at all; for the prior interest, according to the hypothesis, has vested in right or interest, though not in possession. An interest may be limited to take effect either as a remainder after a preceding in-

(c) See *Gower v. Grosvenor*, stated, *Fearne*, 521-2.

terest, or as a conditional limitation, in defeasance thereof.

(See § 240.)

670a IV. ^d An interest may be specially limited to take effect either as an alternative, in case a preceding interest should never vest at all, or as an interest under a conditional limitation, in defeasance thereof in a particular event.(d) (See § 128—136, 148—158.)

IV. An interest may be limited to take effect either as an alternative

or as an interest under a conditional limitation.

671 V. But a mere conditional limitation will have the effect of an alternative disposition; if the prior interest entirely fails,(e) unless the condition annexed to the conditional limitation is not fulfilled, and it does not appear to have been intended that the subsequent limitation should take effect except upon the fulfilment of the condition. [361]

V. A mere conditional limitation will have the effect of an alternative, if the prior interest never vests. So also will a limitation of a springing interest of the seventh kind. Principle of the third and fifth rules.

671a And a limitation of a springing interest of the seventh kind may have a similar effect.(f) (See § 117—127a.)

672 The reason why remainders, conditional limitations, and limitations of springing interests of this kind, are usually capable of operating as alternative limitations seems to be this: that where an interest is postponed so as to take effect by way of remainder, conditional limitation, or springing interest, this seldom arises from any other motive than a desire of benefiting the person to whom the prior interest is limited; and therefore, where he cannot take at all, through the failure of the contingency on which his interest depends, and the reason for postponing the ulterior interest fails on that account, such ulterior limitation, whether by way of remainder, conditional limitation, or limitation of a springing interest, is allowed to take effect immediately as an alternative limitation.

A testator, after providing for such children as he might leave, proceeded thus: but in case all the said children shall die before 21, then, I give all such residue to my wife. Sir W. Grant, M. R., held that the bequest over took effect, though the testator never had any child. *Meadows v. Parry*, 1 V. & B. 124.

So where a testatrix directed, that in case she should have but one child living at the time of her decease, or all but one child, *Murray v. Jones*, 2 V. & B. 313.

(d) See limitation to T. in *Vachel v. Vachel and Lemmon*, 1 Chanc. Cas. 129, as stated, Fearnie, 404; and *Massenburgh v. Ash*, 1 Vern. 304, as stated, Fearnie, 518.

(e) *Jones v. Westcomb*, 1 Eq. Abr. 245; *Andrews v. Fulham*, 1 Wils. 107; *Gulliver v. Wickett*, 1 Wils. 105; and Lord Hardwicke's observations in *Avelyn v. Ward*, 1 Ves. 420; as stated, Fearnie, 510—513. *Doe d. Herbert v. Selby*, 2 Bar. & Cres. 926.

(f) *Avelyn v. Ward*, 1 Ves. 420, as stated; Fearnie, 513.

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one should die under 21 and unmarried, then, her trustees should stand possessed of the residue in trust for another family. The testatrix never had a child. Sir W. Grant, M. R., held, that the bequest over took effect; observing, that if the subject admitted of gradation, it might be said, that the condition was more than fulfilled; the circumstance which was to exclude the residuary legatee being the existence of more than one. (2 V. & B. 320.) But that even if the words imported, if she should have one child living at her death, then, the case fell within *Jones v. Westcumb*: the limitation over depended on the failure of that which preceded it, but that the testatrix had not taken in all the modes by which it might fail. (*Ib.* 322.)

Mackinnon
v. *Sewell*, 2
M. & K.
202.

And where a testatrix gave the residue of her personal estate to her daughter *C. D.*, for life; and, after the decease of *C. D.*, to her grand-daughter, *C. L. D.*, if she should survive her said mother, and live to attain 21; with a direction for her maintenance in the meantime. And in case the said *C. L. D.* should not survive her said mother, and live to attain 21, then, to such other child or children of her said daughter *C. D.*, as should be living at the time of her said daughter's decease, to be paid to them when and as they should have attained 21; with a direction for their maintenance. And, in case of the death of any of them [*i. e.*, such other children as should be living at *C. D.*'s decease] before such age, then, the share or shares of such child or children so dying, to go to the survivors or survivor of them, on their or his coming of age. And if all such other children of her said daughter *C. D.* should happen to die before attainment of the said age, then, to her daughter *L. M.* *C. L. D.* died in the lifetime of the testatrix's daughter *C. D.*; and the only other child *J. D.*, also died in the lifetime of *C. D.*, after having attained 21. Sir L. Shadwell, V. C., and afterwards Lord Brougham, C., on appeal, held, that the bequest over to *L. M.* took effect. His Lordship observed, that the Respondent did not read the words as if they were "all the other children of *Caroline*," but took them literally as they stand, "all such other children of *Caroline*," and contended that they described one class of the children of *Caroline*, namely, those who survived her. That as none survived her, and therefore that class never came into existence, (§ M. & K. 210), there seemed nothing inconsistent with the general intent in giving effect to the executory limitation, by treating it as a gift over upon the removal out of the way of the preceding interests, in whatever manner that removal was effected; whether by persons coming into existence, so as to make the interests vest, and their dying under 21, so as again to divest their estates; or by their never coming into existence, and thus never taking the interests at

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all. (*Ib.* 213.) That if indeed anything had turned on the circumstance of their being surviving children of *Caroline*, the reasoning would have failed (*Ib.* 219); for, wherever the words plainly import a condition as in the testator's contemplation, and where that condition cannot be understood to have been substantially complied with by the event which has actually happened, the gift over fails. (*Ib.* 217.)

The limitation to "such other children of *C. D.* as should be living at her decease," would have given the children, if any, who survived *C. D.*, a vested interest at her death; for, the payment alone, as Lord Brougham intimated, and not the vesting, was postponed till their majority. And hence the ultimate limitation to *L. M.* was a conditional limitation, to take effect in defeasance of the estate of the children of *C. D.* who survived her, in case of their dying before 21. But as there were no such children, that is, no children who survived *C. D.*, and consequently the limitation "to such other children as should be living at her decease," entirely failed, the ultimate limitation to *L. M.* took effect, not as a conditional limitation, in defeasance of a prior estate, but as an alternative limitation, by way of substitution for a prior estate which never took effect at all: so that, in the events which happened, the disposition made by the will was construed as if it amounted to a bequest "to all such other children of *C. D.* as should be living at her decease," to be paid to them at 21, but if there shall be no such children, then, to *L. M.*

So where a testator requested that his plate &c. might be divided equally between his two daughters; and, upon the demise of either of them without lawful issue, then the share of her so dying should go to her sister. One of the daughter's died unmarried in the testator's lifetime. Lord Langdale, M. R., said, that, in the event of either daughter dying without lawful issue, her share was given to her sister, *i. e.* to the survivor of the two daughters; and that the circumstance of the deceased daughter having died in the testator's lifetime did not prevent the gift over to her sister from taking effect. His Lordship referred to *Northey v. Burbage*, Prec. in Chan. 471, pl. 4; *Willing v. Baine*, 3 P. W. 113; *Humphrey's v. Howes*, 1 Russ. & M. 639.

And so, where a testator gave a sum of money in trust to pay the interest to *A.*, for life; remainder to *B.*, for life; remainder to such of the children of *A.* as should be living at the decease of the survivors of *A.* and *B.*, to be paid at 21; with benefit of survivorship, in case of the death of any of them under 21; and if all such children should die under that age, then, from and after the decease of *A.* and *B.*, to pay over the capital to certain other persons. *A.* had only two children, and they attained 21, and died, leaving issue, in *A.*'s

lifetime. Lord Langdale, M. R., held, on the authority of *Mackinnon v. Sewell*, (though that, as his Lordship observed, was the case of a residuary gift) that the words were not to be taken according to their strict meaning, but that the gift over took effect.

Exception. But where the prior limitation is void for remoteness, a subsequent conditional limitation fails. 672a

Routledge v. Dorril, 2 Ves. Jun. 356. A person made a testamentary appointment of a sum of money to *M. D.*, for her life, for her separate use; and after her decease to her children; and, in case she should leave no children, or they should die before 21 or marriage, to *R. D.*, his executors and administrators. The appointment to the children being held to be void for remoteness, in consequence of not being confined to 21 years from lives in being at the creation of the power, it was argued, that the subsequent appointment to *R. D.* was only accelerated by the failure of the prior limitation. But Sir R. P. Arden, M. R., held, that it was void: because (he observed) it would be monstrous to contend, that although it was appointed to *R. D.* in failure of the existence of persons incapable of taking, yet, notwithstanding they exist, he should take as if it was well appointed to them and they had failed. And though there were no children of *M. D.*, and there might be none, yet he agreed with Lord Kenyon, in *Gee v. Audley*, that the Court would not wait to see what contingency would happen, when, at the time it was given, it was at a period more distant than the law would permit. (2 Ves. Jun. 363.)

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VI. Conditional limitation becoming a remainder in the room of a preceding remainder in fee. See § 148-9, 159. VI. Where a remainder in fee, and not in tail or for life, is subject to a conditional limitation, to take effect in defeasance of such remainder, in an event which must happen, if at all, before the regular expiration of the particular estate; in such case, although the conditional limitation has no connexion with the particular estate, in the first instance; yet, if the event happens, on which the conditional limitation is to take effect, the conditional limitation then becomes a remainder expectant upon the particular estate, in the room of the original remainder in fee. 673

Doc d. Harris v. Howell, 10 Bar. & Cres. 197, 202. A testator devised to his daughter, *E. H.*, the wife of *W. H.*, for life; remainder to *W. H.*, for life; remainder to *John*, his daughter's son, and his heirs and assigns for ever; but, in case he should die before the testator's daughter, *E. H.*, and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person as she should think proper. The testator died in February 1763, and *John*, the daughter's son, in April following. In January 1766, the daughter had another son, *W. H.*, the younger. In November 1770, *W. H.* the elder died; and in Hilary Term

1773, *E. H.* levied a fine with proclamations. Bayley, J., in delivering the judgment of the Court, said, that until the death of the testator's grandson, *John*, the limitation by implication to any other child or children whom *E. H.* should leave at her death, "could avail only as an executory devise," by reason of the previous gift of the whole fee to the testator's grandson, *John*. Upon the death of *John*, we think the character and quality of this limitation changed, and it became a contingent remainder. . . . For, at the time the fine was levied, the only vested estate was in *Elizabeth*, the testator's daughter, and her husband in her right; and the only other interest was a contingent remainder in favour of any child or children she should leave at her death, and that remainder the fine has destroyed.

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674 VII. A future interest (as the reader may have perceived from a preceding passage (g),) is never construed as an interest under a conditional limitation or as a springing interest, whether by way of use, or devise, where a preceding freehold has once vested, and the future interest is so limited, that, at the time of the limitation, there was a possibility of its taking effect as a remainder; though other circumstances may seem to indicate that it was not intended to take effect as a remainder; and though eventually, in fact, it may be incapable of operating in that way. But, where a preceding freehold, which was capable of supporting a future interest as a remainder, is, by a subsequent accident, (as by the death of the first devisee in the testator's lifetime) precluded from taking any effect at all; the future interest may take effect as a springing interest by way of use or devise.

675 And, in such case, an ulterior interest in remainder after such less remote future interest as above mentioned, until the less remote future interest vests, also becomes a springing interest, when regarded abstractedly instead of in relation to the less remote future interest; but, as soon as such less remote future interest vests, then such ulterior interest is not only a remainder in relation to such less remote future interest, but it is simply a remainder, even when abstractedly considered; having altogether ceased to be a springing interest, and having resumed that character which it would all along have borne, had the preceding freehold taken effect as intended. (h)

676 interest, abstractedly regarded, though it is a remainder as regards the less remote springing interest.

677 And, in like manner, in other cases, an ulterior interest in remainder after a less remote future interest in other cases,

(g) See § 196—199, and cases there referred to. And see *Fearne*, 526.

(h) See *Hopkins v. Hopkins*, Cas. temp. Talb. 44, as stated, *Fearne*, 525—6.

until a less remote future interest vests, an ulterior interest in remainder is a springing interest, abstractedly considered, though it is a remainder as regards such less remote future interest.

Doe d. Scott v. Roach, 5 Mau. & Selw. 482.

terest, until such less remote future interest vests, is a springing interest, when regarded abstractedly instead of in relation to such less remote future interest; but as soon as such less remote future interest vests, such ulterior interest becomes simply a remainder, even when abstractedly considered.⁽ⁱ⁾

A testatrix devised lands to *J. N.*, his heirs and assigns for ever; provided that if *J. N.* should die without any issue on the body of his then wife begotten, that the lands, after the death of *J. N.* and his wife, should go to all the children of the testator's grand-daughter, *M. D.*, as tenants in common. *J. N.* died without issue, in the lifetime of the testatrix, leaving his wife him surviving. It was held, that *J. N.* would have taken an estate tail if he had survived the testatrix; and the limitation to *M. D.*'s children would have operated by way of contingent remainder; but that, as the estate tail had lapsed, and the law would not raise an estate for life by implication in *J. N.*'s widow, there was no estate of freehold to support the interest of *M. D.*'s children, as in remainder; and therefore, on the authority of *Hopkins v. Hopkins*, Cas. Temp. Talb. 44, the limitation to them operated by way of executory devise. Lord Ellenborough, C. J., stated the rule to be, that no limitation shall operate by way of executory devise, which, at the time of the death of the testator, was capable of operating by way of contingent remainder. His Lordship observed, that it was clearly the intent to benefit *J. N.* and his issue in the first place; and, in the next place, *M. D.*'s children; but that the manner of carrying the intention into execution, whether by way of remainder, or executory devise, or any other mode, rarely enters into the mind or constitutes part of the intention of the testator.

CHAPTER THE TWENTY-FIFTH.

LIMITATIONS OPERATING DIFFERENTLY IN REGARD TO DIFFERENT LIMITATIONS.

I. The same limitation may be a remainder,

I. The same limitation may be at once an alternative limitation in regard to the next preceding limitation, and a conditional limitation with respect to another preceding limitation;^(a) or a remainder, in rela-

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(i) *Stephens v. Stephens*, Cas. temp. Talb. 228, as stated, *Fearne*, 519, 526.
(a) See *Fearne*, 514, note (l).

tion to the next preceding limitation; an alternative limitation, in regard to another limitation; and a conditional limitation, with respect to a still earlier limitation.

679 For, since a remainder usually has the effect of an alternative limitation, if the preceding interest never takes effect at all; where the preceding interest is an alternative limitation, which does not carry a fee simple or qualified, and which is a substitute for a prior limitation in fee, and neither the prior limitation in fee, nor the intervening alternative limitation so substituted for it, take any effect at all, the remainder, operating in this case as a substitute for a substitute, that is, for the intervening alternative limitation, must be a substitute for the prior limitation in fee: and hence, the remainder, at the time of its creation, is capable of operating either as a remainder, or as an alternative limitation, as regards the intervening alternative limitation, and also as a simply alternative limitation in respect to the prior limitation in fee. And where a clause takes effect, by way of alternative limitation, as a substitute for a conditional limitation, it must be itself a conditional limitation, with respect to the interest to be defeated by the conditional limitation for which it is a substitute.

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681 To illustrate the truth of these positions, let us suppose that lands are devised to the use of *A.* and his heirs; and if he shall leave no child of his body living at his decease, to the first son of *B.* who shall attain the age of 21, and his heirs; and if *B.* shall have no such son, to all the daughters of *B.* who shall attain the age of 21, or marry, and the heirs of their bodies, &c., remainder to *C.* and his heirs. In this case, if *A.* leaves no child living at his decease, and *B.* has no son who attains 21, but the estate vests in the daughters of *B.*, and there is afterwards a failure of issue of their bodies, the limitation to *C.* will operate as a remainder in relation to the limitation to the daughters of *B.* But if *A.* leaves no child of his body living at his decease, and *B.* has no son who attains 21, nor any daughter who attains that age or is married, the limitation to *C.*, instead of operating as a remainder, takes effect as a substitute for the intervening alternative limitation to the daughters of *B.*, which is a substitute for the prior limitation to the son of *B.*; and thus the limitation to *C.*, is mediately and virtually a substitute for the prior limitation to the son of *B.*, or, in other words, an alternative limitation in regard to the gift to the son of *B.* And, in such case, it is also a conditional limitation as respects the limitation to *A.*; inasmuch as the gift to the son of *B.*, for which it is mediately and virtually an alternative or substitute, is a conditional limitation, as regards the limitation to *A.* If *A.*

an alternative, and a conditional limitation. See § 159, 128, 148-9. See § 669.

has no child of his body living at his decease, the fee is to pass from him, and whatever limitation may happen to be the one which attracts and transfers the fee from him to another person on that event, is a conditional limitation, as regards the limitation to *A.*: so that, if *A.* leaves no child living as aforesaid, and *B.* has no child who becomes capable of taking, the limitation to *C.* will take effect on the death of *A.*; and by transferring the fee from *A.* to *C.*, will operate as an alternative limitation, as regards the conditional limitations to the sons and daughters of *B.*, and thus, standing in their place, will also operate as a conditional limitation, as respects the limitation to *A.*, in the same manner as the limitation to the sons of *B.* would have operated, had it taken any effect.

II. The same limitation may be an alternative and an aug-

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mentative limitation, or a limitation of a springing interest.

See § 128, 137, 117.

III. Every more remote limitation may be a

remainder as regards a prior limitation, though not limited next after it.

See § 159.
Doe d. Herbert v. Selby, 2 Bar. & Cres. 926.

See § 159.

See § 148-158.

II. And it would seem, that, in a similar manner, the same limitation may be an alternative limitation in regard to the next preceding contingent limitation, and, at the same time, as respects another preceding limitation, or the absence of any preceding vested limitation, an augmentative limitation, or a limitation of a springing interest.

III. Every more remote limitation may be a remainder, as regards a prior limitation, though it is not limited next after such prior limitation, so long as it is to take effect, if at all, on the regular expiration of the interest created by such prior limitation.

T. H. devised to his son *G.* for life; and, from and after his decease, unto all and every the children and child of *G.*, lawfully to be begotten, and their heirs for ever, to hold as tenants in common; but, if his son *G.* should die without issue, or leaving issue, and such child or children should die before attaining the age of 21 years, or, without lawful issue, then, he devised the same estates unto his son *T.*, his daughter *A. S.*, and his son-in-law *W. D.*, and to their heirs for ever, as tenants in common. After the testator's death, *G.* suffered a recovery, and died unmarried, and without issue. Bayley, J., remarked that the devise must be read "if the children should die before 21 and without issue," as otherwise the remainder [executory devise] would be too remote. And he added that "an estate may be devised over in either of two events; and that, in one event, the devise may operate as a contingent remainder [in relation to the particular estate]; in the other, as an executory devise, [in relation to an intervening interest]. Thus, if *George* had left a child, a determinable fee would have vested in that child, and then, the devise over could only have operated as an executory devise, [*i. e.* as a conditional limitation by way of executory devise]. But, *George* having died without having a child, the first fee never vested, and

the remainder over continued a contingent remainder" [in relation to the particular estate]. And the Court held accordingly, that it was a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery.

CHAPTER THE TWENTY-SIXTH. [371]

LIMITATIONS INTENDED TO OPERATE IN DIFFERENT WAYS, IN REGARD TO DIFFERENT PORTIONS OF PROPERTY.

683 It would seem that a limitation may operate in different ways in regard to different portions of property. Thus, Limitations may operate in this way.

684 I. There would appear to be no reason why a limitation should not, by express words, be made to operate as a conditional limitation in regard to property previously devised to some other person, and also as a limitation of a springing interest in regard to property not before devised; in such a way, that, in one and the same event, both portions of property may go to the same person. I. A limitation may be penned so as to operate as a conditional limitation, and as a limitation of a springing interest, in regard to different portions of property.—See § 148, 9, 117, 127b.

685 II. In a similar manner, it is conceived, that a limitation may be penned so as to operate as an alternative limitation, in regard to one portion of property, and as another kind of limitation, in regard to another portion of property. II. A limitation may be so penned as to operate as an alternative and as another kind of limitation, in regard to different portions of property.

686 It may indeed be objected, that as the person who is the object of an alternative limitation, is only a substitute for the primary object of the testator's bounty, there is an improbability, *a priori*, that the alternative limitation should be intended to vest in him a larger amount of property than the prior limitation would have vested in the primary object, in whose stead he is to take. But, yet, it is conceived, that an alternative limitation, may, by express words, have this operation, unless the event on which the alternative limitation is to take effect, is too remote as regards the additional property. See § 128, 112, 706. Objection.

In the case of *Malcolm v. Taylor*, the contrary 687
might seem to be decided; but probably it is not.

to be regarded as going the length of establishing a general
rule, to the effect, that an alternative limitation cannot be
made to pass more than would have passed in the opposite
event, under the prior limitation, for which it is a substitute.

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Malcolm v.
Taylor, 2
Russ. & M.
416.

In that case a testatrix devised and bequeathed a West
India plantation, and all the residue of her money in the
funds, and also her plate, books, and certain portraits, to
E. G. T., and *M. T.*, for their lives, equally; and, after the
death of either, the whole to the survivor, for life; and,
after the decease of the survivor, then, unto such children
of *M. T.* as she should appoint; and, in default of appoint-
ment, then the plantation and the residue of the stock to be
equally divided among the said children and their heirs;
the stock to be an interest vested in them, being sons, at
21, and, being daughters, at 21 or marriage; but in case
M. T. should die without issue of her body, the testatrix
devised the plantation equally among the children of *A. T.*
and their heirs and assigns; and in case *M. T.* should die
without issue as aforesaid, the testatrix bequeathed the said
residue of stock, and all her said plate, books, and portraits,
unto *I. M.* and his assigns, for his life, and, after his decease,
she bequeathed the same to his eldest son for ever. But, in
case the said *I. M.* should die under age and without issue,
she then gave the said residue of stock, plate, books, and
portraits, to *M. M.* absolutely. *M. T.* survived *E. G. T.*,
and died without having been married. It was held by the
Master of the Rolls, and afterwards by Lord Brougham, C.,
on appeal, that *I. M.* took a life interest in the stock; but
no interest in the plate, books, and portraits. 1. *I. M.* took
an interest of some kind in the stock. It was argued, that
the words, "in case *M. T.* should die without issue as
aforesaid," imported an indefinite failure of issue. But it
was decided, that they referred back to the children, so as
to amount to an alternative limitation in the event of *M. T.*
having no children at all; the testatrix clearly intending to
bequeath the stock to the children of *M. T.*, if she had any
children, and to *I. M.*, if she had not any children. 2. The
interest which *I. M.* took was only for life: for, it would be
doing the utmost violence to the obvious meaning of the
clause, to construe "son" a word of limitation, when, in
almost every case, it is a word of purchase, and the interest
of *I. M.* was expressly restricted to a life interest; and the
meaning of the subsequent words, "in case the said *I. M.*
shall die under age, and without issue," might fairly be
taken to refer to the contingency of his dying without
having had any children. 3. It was held that *I. M.* took no

See § 402-4.

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interest in the books, plate, and portraits. The reason of this decision is thus stated by Lord Brougham. "It [i. e. the plate] is first given, with the plantation and the stock, to *Elizabeth* and *Maria*, and the survivor, for life, and, after the survivor's decease, to *Maria's* children, as she may appoint. Here the plate [together with the books and portraits] is dropped, and no provision with regard to it is made, in the event of *Maria Taylor* failing to exercise her power of appointment. So that, in this first portion of the will, there is no dealing with the plate, to which, in construing the subsequent gift over, the words 'without issue as aforesaid' can be referred back. If then the construction as to the stock be a sound one, which refers those words to such issue as had been mentioned when dealing with the same fund in the former clause, and not to the issue mentioned when dealing with the plantation; by parity of reason, all reference back must be excluded, in construing the same words as to the plate; inasmuch as there is nothing before mentioned touching the plate in connexion with the children, or with any thing to which issue can refer. The plate, then, will be given over on a general failure of issue, and whether from the gift being too remote, or from the gift to her being what in the case of realty would be an estate tail—it is indifferent which—*Maria Taylor* takes absolutely; and consequently, the interest in this part of the property now vests in her personal representatives." (2 Russ. & M. 444.)

With the utmost deference for so great an authority, it may perhaps be questioned, whether this part of the decision is altogether satisfactory—whether there was any necessity for the conclusion to which the noble and learned Judge thought himself, by parity of reason, obliged to come. The reasoning at the bar would seem to be perfectly incontrovertible, when it was urged, that there was "but one set of words introducing the gift over, both of the funded property and of the plate and books, and equally referable to both. How then was it possible to deny to the same words the same construction, with reference to one and the same subject matter? for, though the descriptions of property are two, they form the subject of but one gift;" (1b. 428) and (it might have been added) they are of the same legal nature, being both personal estate. It is true, indeed, there was some degree of improbability, *a priori*, in the supposition, that the alternative limitation should have been intended to confer on *I. M.* and his son, a larger amount of property, in the event of there being no children of *M. T.*, than those children, the prior objects of the testator's bounty, would have taken, if any such had existed. But this dif-

See § 706,
714, 719.
See § 593,
593a.

Observations
on *Malcolm*
v. *Taylor*.

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ference, as was urged at the bar, probably arose from a mere accidental slip. But admitting that it did not, the simple question would seem to be, not what was the probability or improbability, *a priori*; but, what were the express words? and, whether there is any rule of law, preventing an alternative limitation, however it may be framed, from conferring on the person who is the object of it, a larger amount of property than the other party would have received for whom he is substituted?

PART III.

**RULES AND PRINCIPLES RELATING TO MISCELLA-
NEOUS POINTS IN THE LEARNING OF EXECUTORY
INTERESTS.**

CHAPTER THE FIRST.

OF THE EFFECT OF THE NON-FULFILMENT OF CONDITIONS (a) PRECEDENT AND MIXED.

685 I. WHEN the vesting of an interest, whether in real or personal estate, is made to depend upon a condition precedent or mixed, and such condition is not exactly fulfilled, the interest which is to arise thereon, if it is not a mere alternative interest, fails altogether, however plain the apparent intention to the contrary may be, unless such intention is sufficiently expressed by, or necessarily implied in, other words in the instrument.

689 And if such interest was to arise by way of conditional limitation, in defeasance of a prior interest, such prior interest then becomes absolute and indefeasible: (b) because, the condition, as regards such prior interest, is a condition subsequent; and an interest subject to be defeated by a condition subsequent, of course becomes absolute, when the fulfilment of such condition can no longer take place.

The exact fulfilment, then, of a condition precedent or mixed, being requisite, it follows, that

690 1. Where an event may take place under different circumstances, and the testator has only provided for its happening under one state of circumstances; in such case, if it happens under other circumstances, the interest limited will fail, unless it is a mere alternative interest, although the difference in the circumstances may appear to be perfectly immaterial, and although it is almost certain, conjecturally, that the testator, in providing for one case, forgot to provide for others that might arise, instead of intending the interest to depend on the event happening in the mode specified.

A testator, if his son should die, leaving his, the testator's, wife, without leaving a widow or any child, after his death and his wife's, gave to F. H. a legacy charged on his real estate. The son survived the testator's wife, and then died, without leaving a widow or child. Sir R. P. Arden, M. R., (on the authority of *Doo v. Brabant*, and *Calthorp v.*

I. Effect of the non-fulfilment of conditions precedent and mixed, (§ 18, 14,) where the limitation is not a mere alternative, (§ 128). See § 11, 12.

1. Where the event happens under other circumstances than those specified, [378] and the limitation is not a mere alternative.

(a) As to the question, what amounts to a fulfilment of a condition, the reader is referred to the learning of conditions in the text books and abridgments, such as Coke upon Littleton, Sheppard's Touchstone, and Viner's Abridgment.

(b) See *Jackson v. Noble*, 2 Keen, 590.

Gough, 3 Bro. C. C. 393, 395; and *Denn v. Bagshaw*, 6 T. R. B. R. 512,) held, that the legacy failed: for though he was perfectly satisfied as to the intention, yet it was not sufficiently expressed to enable him to execute it.

Parsons v.

Parsons, 5

Ves. 578.

See also

Pearson v.

Simpson, 15

Ves. 29.

So where a testator directed, that in case *J. H.* should die before 21, leaving issue, then, that his executors should divide a sum of money among the children of *J. H.*; and *J. H.* died, leaving issue, before the time at which the money was given to herself, but after she had attained 21. Sir R. P. Arden, M. R., on the authority of the same cases, held, that the legacy failed; though he observed that *Denn v. Bagshaw* revolts the feelings of any man sitting in judgment, provided he is at liberty to indulge them in anything beyond necessary implication.

Dicken v.

Clarke, 2

You. & Coll.

872.

And where a testator, after making other limitations, proceeded thus: "But, in case of such, my son's demise in the widowhood of his mother, without leaving lawful issue, then, I direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of 40*l.* per annum to be paid to *T. B.*; and, in case of the marriage or death of my wife, my son being dead, and leaving no lawful issue; then, I give the whole of the proceeds of my estate to *J. B.*" The son survived the widow, and died without issue. Alderson, B., held, that the estate belonged to the heir-at-law.

2. Where a

limitation

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[379]

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2. And where a testator confines his bounty to 691 certain descendants only of himself or another

person, and then limits the property over, in case of his or of such other persons dying without leaving issue; in this case, if he or such other person does leave issue at all, though none of the description to whom the property was expressly limited, the Court will not supply the word "such," or "said," so as to make the limitation over capable of taking effect on the failure of the issue who were the objects of the prior limitations, but will hold the limitation over to have failed.

Doe d. Rew,

v. Lucraft,

6 Bing. 886.

A testator devised one moiety of and in a house, as follows: "In trust for such son of mine, by my present wife, as shall first attain the age of 21, as and when such son shall attain such age, and for his heirs and assigns for ever. But, in case I shall depart this life without leaving a son, or, leaving such, none shall live to attain the age of 21 years, then, in trust for my daughter, *J. N.*; if she shall live to attain the age of 21 years, and for her heirs and assigns for ever. But, in case my said daughter shall depart this life, under that age, then, in trust for such other my daughter, by my present wife, as shall live to attain the age of 21 years, and for her heirs and assigns for ever. But should I depart this life without leaving issue, then, in trust for *N. L.*

(his wife's brother), his heirs and assigns, for ever." *J. N.*, the testator's daughter and only child died at the age of 4 years. It was held that *N. L.* took nothing.

And where a testator bequeathed a sum of stock, in trust for *G. G.*, for life; and, in case he should marry any woman with 1000*l.* fortune, then, his will was, that the said sum of stock be settled upon his wife and the issue of such marriage; but, in case of his son's decease, leaving no issue; then, he gave the stock to certain other persons, and bequeathed the residue of his estate to *W. W.* Two suits were instituted respecting this property. And Lord Gifford, *M. R.*, held, that the words of the will were not sufficient to create a *quasi* entail in *G. G.*, since the fund was given over, not upon a failure of *G. G.*'s issue generally, but upon his leaving no issue at the time of his death; and it was far from the testator's intention, that the effect of his bequest should be, to give his son the absolute property of the fund, whomsoever he might marry, which would in fact be the consequence, by the rules of law in regard to personal estate, if the son took a *quasi* estate tail. Neither were these words sufficient to imply a gift to the issue of *G. G.* And His Lordship refused to insert the word "such," in favour of the persons claiming under the limitations over, and to read the clause, "in case of my son's death leaving no such issue;" but held, that the limitations over failed, because the son did leave issue.

[380]

692 II. Where a conditional limitation is limited in favour of unborn persons, or persons who shall answer a given description, and no such persons come in *esse* or answer such description, the preceding estate becomes absolute: because, although the express condition may have been fulfilled, on which such estate is to go over, yet, as there is no one to whom it can go over, according to the terms of the conditional limitation, it must of necessity remain undevested by the fulfilment of the express condition. Or, to view the point in another light; if the existence, at some period, of the objects of the conditional limitation, is regarded as indirectly forming a part of the condition; then, the subsequent interest necessarily fails, on account of the non-fulfilment of such condition, according to the first general rule in the present chapter.

A testator gave personal estate to his wife, for life; and, after her death, the capital to be divided between the testator's brothers and sisters, in equal shares; but, in case of the death of any of them in the lifetime of the wife, the shares of him, her, or them so dying, to be divided between his children. One of the brother's died in the lifetime of the testator's widow, without having ever had a

child. Sir W. Grant, M. R., held, that he took a vested interest, subject to be divested only, [in effect,] in the event of his death in the life of the widow, leaving children; and consequently that event not having happened, his representative was entitled.

Harrison v. Foreman, 5 Ves. 206.

And where a testator gave 40*l.* per annum, part of a sum of annuities, in trust to pay the dividends to *S. B.*, for life, for her separate use; and, after her decease, upon trust to transfer the said sum of 40*l.* per annum, or the stock or fund wherein the produce might be invested, to *P. S.* and *S. S.*, in equal moieties; and, in case of the death of either of them in the lifetime of *S. B.*, then, he gave the whole to the survivor living at her decease. *P. S.* and *S. S.* both died in the lifetime of *S. B.* Sir R. P. Arden, M. R., held, that, as in the case of real estate, they took vested interests, subject to be divested on a contingency that had not happened.

[381]

III. Where the limitation is a mere alternative limitation.

Principle of the distinction.

III. But, a limitation which is simply an alternative limitation, will be allowed to take effect, if, in any way, the next preceding limitation fails to take any effect, even though the precise event on which such alternative limitation is to take effect never happens.

694

It is considered that the testator intended that so long as the preceding limitation fails of taking effect, whether in the event specified, or in any other, the alternative limitation shall operate in lieu of it: for, as the condition on which a mere alternative limitation is made to depend, is not of such a nature as to constitute intrinsically any ground or reason for the testator's bounty towards the objects of the alternative limitation, but it is the mere negation of the contingency on which the preceding limitation depends; it is more consonant to sound construction, not to regard it in the light of an ordinary condition precedent, constituting a literal pre-requisite to the vesting of the interest, but to view it as amounting to a general expression of an intention, that in the event of the failure of such preceding interest, another should take effect in its stead.

695

See § 18.

Prestwidge v. Groombridge, 6 Sim. 171. See also *Fonnereau v. Fonnereau*, 3 Atk. 315, as stated, *Fearne*, 512.

A testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews *George* and *Charles*; and the principal to be applied, either in binding them apprentices at the age of 14, or to be reserved till they attained 21, to commence business. And, in the event of *George* and *Charles* (both or either of them) being settled before the will should come in force, she provided, that the next boy (*James* or *Henry*) should "have the benefit, and so on." *George* and *Charles* survived the testatrix, but died under 21, before the principal was applied in binding them apprentices. Sir L. Shadwell, V. C., said, that the intention of the testatrix was, to make a provision,

out of the fund, for two of her brother's sons; and if the provision failed as to either *George* or *Charles*, that *James* should be supported out of it; and if it failed as to both of them, then; that *Henry* should be supported out of it.

And where a testator bequeathed the interest of a sum of stock to *A.* and *B.*, for their lives; and, after their deaths, he directed his trustees to transfer the capital to their children then living who should attain 21; with a proviso, that in case either of them, *A.* and *B.*, should have any child or children living at the time of their respective deceases, but which should all die before 21, then, his trustees should assign the share of the legatee so dying without issue, to enjoy as aforesaid, unto the survivor of them the said *A.* and *B.* *A.* died; leaving a child, who attained 21. *B.* afterwards died, without having had any issue. Sir L. Shadwell, V. C., held, according to *Mackinnon v. Sewell*, that the limitation over took effect, and *A.*'s personal representative was entitled to *B.*'s moiety of the stock. His Honour observed, that he could not but think that the testator intended the limitation over to take effect in the event of either of the first takers not having a child to take, as well as in the event of either of them not having a child who should take so as to enjoy; and that the word "survivor" must of necessity be taken to mean "other;" for, the testator contemplated [*i. e.* intended to provide for] the event, not of one of the legatees dying in the lifetime of the other, but of one of them dying childless.

Without differing from the learned Judge, in his opinion that *Mackinnon v. Sewell* governed this case, it may be useful to observe, that *Mackinnon v. Sewell* was the case of a conditional limitation allowed to operate as an alternative, in the events that happened; but, in this case, the limitation is simply an alternative, to take effect in case the limitation to the children should never vest.

Aiton v. Brooks, 7 Sim. 204. See also *Bradford v. Foley*, Doug. Rep. 63, as stated, *Fearne*, 234, which was a case of real estate.

Observation on *Aiton v. Brooks*. See § 671-2.

CHAPTER THE SECOND.

[383]

OF THE EFFECT OF THE ORIGINAL INVALIDITY OR THE EVENTUAL IMPOSSIBILITY OF CONDITIONS.

696 WITHOUT entering minutely into the question, What conditions are void, which is a subject fully discussed under the head of conditions in the text books and abridgments, it may here be observed, that conditions are void,

1. Morally wrong or civilly unlawful.

2. Repugnant to a rule of law.

3. Contrariant in themselves.

4. Uncertain or ambiguous.

5. Restraining from suffering a recovery or [384] levying a fine within stat. 4 H. VII. and 32 H. VIII.

6. Impossible.

7. Too remotely possible.

What is too remote a possibility.

1. ^a If they require the performance of an act which is morally wrong or civilly unlawful. (a)

2. ^b If they are repugnant to a rule of law: as where the condition is a condition at common law, to defeat a part only of an estate tail. (b)

3. ^c If they are contrariant in themselves: as in the case of a proviso for determining an estate tail as if tenant in tail were dead, (c) without adding any such words as "and there were a general failure of issue inheritable under the entail." (d)

4. ^e If they are uncertain or ambiguous: as in the case of a proviso against advisedly and effectually attempting &c. to alien. (e)

5. ^f If they restrain tenant in tail from suffering a recovery, or levying a fine within the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36; (f) and not from levying or making ^g a mere fine at common law, feoffment or other tortious discontinuance or alienation, (g) or ^h a sale or lease before a certain age. (h)

6. ⁱ If they are impossible at the time of their creation, or afterwards become so, by the act of God, by the act of law, or by the act of the party who is entitled to the benefit of them. (i)

7. If the contingency is too remote a possibility. 697

^a A limitation may be made to depend on any number of contingencies, even though they may be engrafted on each other, so long as each amounts to a common probability, and so long as they may, according to common probability, grow out of, or be connected with, each other, in the manner specified by the instrument containing the limitation. But a limitation is invalid, when made to depend on a single contingency, if it is made to depend on a remote possibility, or when made to depend on two contingencies, if, according to common 698

(a) See *Fearne*, 249, 276.

(b) *Ib.* 252.

(c) *Corbet's Case*, 1 Rep. 83 b; *Jermyn v. Ascot*, 1 Rep. 85 a; and *Cholmeley v. Humble*, 1 Rep. 86 a; as stated, *Fearne*, 253. See also *Plesington's Case*, as stated, *Fearne*, 256.

(d) *Fearne*, 254, note (e).

(e) *Mildmay's Case*, 6 Rep. 49; and *Foy v. J. Hynde*, Cro. Jac. 696—7; as stated, *Fearne*, 255, 256.

(f) *Mary Portington's Case*, 10 Rep. 36; and *Sunday's Case*, 9 Rep. 128; as stated, *Fearne*, 258. See also remarks on *Rudhall v. Milward*, Savile, 76; *Fearne*, 259.

(g) *Fearne*, 259, 260. *Pearce v. Win*, 1 Vent. 321; and *Croker v. Trevithin*, Cro. Eliz. 35, and 1 Leon. 292; as stated, *Fearne*, 260.

(h) *Spittle and Davie's Case*, 2 Leon. 38; Moor, 271; as stated, *Fearne*, 261.

(i) 2 Bl. Com. 156, 157; Prest. Shep. T. 129; and Shep. T. 132, 133.

probability, they do not grow out of, or are not connected with, each other, in the manner specified. ^(k)

699 I. If a void condition is precedent, the interest I. Effect of which is to vest on the fulfilment thereof can never take effect. (See § 13.) the invalidity of conditions

700 II. If the void condition is subsequent, as the precedent. estate to which it is annexed cannot be defeated II. Effect of by it, such estate is absolute in the first instance, or afterwards becomes so. ^(l) the invalidity of conditions subsequent.—See § 12, 15-19.

700a III. If the void condition is a mixed condition, III. Effect of the preceding estate intended to be annihilated by [385] it, is absolute in the first instance, or afterwards becomes so; the invalidity and the estate to arise or be accelerated on the fulfilment of of a mixed condition, the condition cannot arise or be accelerated. See § 14, 20-22.

701 IV. And if the condition is of that species IV. Effect of which are termed, in a preceding chapter, special the invalidity or collateral limitations, the effect is the same as if it were of a special. a proper condition subsequent. ^(m) See § 3, 7, 12, 24—43. or collateral limitation.

CHAPTER THE THIRD.

[386]

OF THE TIME FOR THE VESTING OF REMAINDERS.

702 I. "It is a general rule, that every remainder must I. A remain- vest either during the particular estate, or else at der must vest the very instant of its determination." ^(a) Or, to state the during, or on the rule somewhat more precisely; a contingent remainder can- the determi- not vest at all, unless it vests during the existence of a pre- nation of, the- vious estate of freehold, or at least at the very instant of the particular the determination of the sole or last subsisting previous estate. estate of freehold.

703 "This rule," observes the learned authority upon this subject, "was originally founded on

(k) See Fearn, 250—252, and Butler's note (c).

(l) 2 Bl. Com. 156, 157; Pres. Shep. T. 129; and Shep. T. 132, 133.

(m) See Shep. T. 133. See also *Aislabie v. Rice*, 3 Mad. 260, for an instance of the effect of the eventual impossibility, by the act of God, of an irregular collateral limitation. See § 39.

(a) Fearn, 307, 308. And see *Doe d. Mussel v. Morgan*, 3 Durn. & East, 763, as stated, Fearn, 309.

feodal principles, and was intended to avoid the inconveniences which might arise, by admitting an interval, when there should be no tenant of the freehold to do the services to the lord or answer to strangers' præcipes; as well as to preserve an uninterrupted connexion between the particular estate and the remainder, which, in the consideration of law, are but several parts of one whole estate."(a) Some further observations upon the point will be found in a subsequent chapter.

II. A remainder may fail as to one part only. II. "It follows, that an estate limited on a contingency, may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons in common or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it."(b) 703a

[387] III. "So likewise a contingent remainder may take effect in some, and not in all the persons to whom it was limited; according as some may come in *esse* before the determination of the preceding estate, and others not."(c) 703b

A remainder, when it has once vested in possession, and not merely in interest, in some persons, cannot open and let in others. For, an estate by way of remainder, when it has once vested in some person or persons, cannot afterwards open, so as to let in others who were not in *esse* till after the determination of the particular estate; though ^d where it has only vested in interest, it will open, so as to let in others who become capable of taking before the remainder has actually vested in possession, that is, before the determination of the particular estate.(d) 704

In other words, where real property is limited, by way of remainder, to a class of persons, some or all of whom are unborn; if any of them come in *esse* before the determination of the particular estate, the property will vest in such person or persons, subject to open and let in the other members of the class, who may happen to come in *esse* before the determination of the particular estate. But those who are born after the determination thereof, will be excluded: for, a similar rule to that which applies to an entire property limited in remainder to one person, requiring that it should vest before that period, applies to the individual share of any property limited to a class of persons.

(a) Fearne, 307, 308. And see *Doe d. Mussel v. Morgan*, 3 Durn. & East, 783, as stated, Fearnie, 309.

(b) Fearne, 310; and *Lane v. Pannel*, 1 Roll. Rep. 238, 317, 438, as there stated.

(c) Fearne, 312.

(d) *Doe d. Comberbach, v. Petryn*, 3 Durn. & East, 484; *Doe d. Willis, v. Martin*, 4 Durn. & East, 39, as stated, Fearnie, 314; *Matthews v. Temple*, Comb, 467, as stated, Fearnie, 313.

705 The application, however, of such a rule to the Grounds of vesting of the individual shares, after the aggregate property has vested in some one of the class, must depend on different reasons from those above mentioned in relation to an entire property limited in remainder to one person: since there is a tenant of the freehold, and there is an uninterrupted connexion between the particular estate and the remainder. The application of the rule to the vesting of the individual shares, in the given case, appears rather to be grounded upon a principle of convenience, and to be analogous to those cases of personal estate bequeathed to a class of persons, in which those alone are admitted, who come in *esse* before the period of distribution. [388]

A testator devised the residue of freehold estates, called the Littleton estates, to trustees, during the life of his son, *J. H.*, upon certain trusts; remainder to his son's children, for their lives; and, from and after their decease, he devised the same unto their lawful issue, to hold unto such issue and their heirs, as tenants in common, without survivorship; and, in default of such issue, he devised to the children of his daughter, *S. M.*, and their issue, in the same words; and, in default of such issue, to certain other persons. *J. H.* died, without ever having a child. *S. M.* had nine children. The Court of King's Bench certified, that six of the nine children of *S. M.*, namely, five who were born in the lifetime of *J. H.*, and one who was *in ventre matris* at the death of *J. H.*, took estates in tail general, with cross remainders; but that the other children took nothing.

As to the reason for excluding the three other children, it is a rule, that a limitation shall not be construed as an executory devise, which may be supported as a remainder; and hence the limitation to the children of *S. M.* was doubtless considered to be a remainder expectant on the decease of *J. H.*; and, being a remainder, it was necessary that those who were to take under such limitation, should be in *esse* at the determination of the particular estate, that is, at the death of *J. H.* Observation on this part of the case.

The testator devised other parts of the Littleton estates to his wife, for life; and, after her decease, to the same uses as in the devise last stated. The Court certified, that all the nine children of *S. M.* took under this devise, in manner aforesaid, all being born in the widow's lifetime, and therefore capable of taking on the determination of the particular estate, that is, of her life estate. S. C. 1 Meriv.

The testator, (according to a fictitious clause inserted in the case stated to the Court) devised another fee simple estate, called the Upper Mark Estate (without any previous limitation) to the children of *S. M.*, and their issue, in the same words as before. The Court certified, that all the nine children took in manner aforesaid. Meriv.

Observation
on this part
of the case.
See § 111,
111a.

It would seem that this must have been regarded, not as a purely immediate devise, though *S. M.* had two children born before the date of the will, but as a sort of mixed devise, immediate in regard to the children born at the date of the will, and executory in regard to the children born afterwards. (See *Fearne*, 533—7.)

S. C. 1
Meriv.

The testator devised another fee simple estate, called the Mark Estate (or Lower Mark Estate, to distinguish it from the fictitious estate above mentioned) to trustees, for the maintenance of the children of *S. M.*, during their lives; and, after their decease, he gave the estate to the lawful issue of such children, in the same words as before. The Court certified, that the issue of such of *S. M.*'s children as were born prior to the testator's decease [*i. e.* the issue of four of her children] took, as tenants in common in fee simple, expectant upon the determination of the estate limited to the trustees.

Observations
on this part,
of the case.

Here, the word issue was construed a word of purchase, because, the interest given to the children of *S. M.*, being merely equitable, could not unite with the legal interest limited to their issue. The issue of the other children were necessarily excluded; because, the unborn issue of parents who are themselves yet unborn, cannot take by purchase, that being contrary to the rule against perpetuities.

See § 706,
709, 710.

S. C. 1
Meriv.

The testator (according to the case stated to the Court) also devised leaseholds for lives and years, so that the issues and profits might belong to the children of *S. M.*, and so on as before. The Court certified, that all the nine children took the absolute interest in the leaseholds for years; and that they took interest in the nature of estates tail, with limitations thereupon in the nature of cross remainders, in the leaseholds for lives.

See § 100-3.

The certificate was confirmed by Sir W. Grant, M. R.

Observations
of Bayley, J.,
in *Doe d.*
Long v.
Prigg, 8
[390]
Bar. & Cres.
235.

And in *Doe d. Long v. Prigg*, Bayley, J., said, "There is no doubt but that upon an ordinary limitation by way of remainder to a class, as children, grand-children, &c., all who come in *esse* before the particular estates end, and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come in *esse*; and that they and their representatives will take as if they had been in *esse* at the testator's death. This is settled by *Baldwin v. Carver*, 1 Cowp. 309; *Roe v. Perryn*, 3 T. R. 484; *Doe v. Dorrell*, 5 T. R. 518; *Meredith v. Meredith*, 10 East, 303; and *Right v. Creber*, 5 Bar. & Cres. 866."

CHAPTER THE FOURTH.

OF THE TIME FOR THE VESTING OF EXECUTORY INTERESTS NOT LIMITED BY WAY OF REMAINDER.

SECTION THE FIRST.

The General Rule against Perpetuities stated and Explained.

706. * EXECUTORY interests, other than those in remainder after or engrafted on an estate tail, (a) stated. must be so limited, that, from the first moment of their limitation, it may be said that they will necessarily vest in right, if at all, within the period occupied by the life of a person in being, that is, already born, ^b or *in ventre matris*, (b) or the lives of any number of persons described and in being, * "not exceeding that to which testimony can be applied to determine when the survivor of them drops," (c) and by the infancy of any child born previously to the decease of such person or persons, or ^b the gestation and infancy of any child *in ventre matris* at that time; (b) or, ^d "within the period occupied by the life or lives of such person or persons in being, and an absolute term of 21 years afterwards, and no more, without reference to the infancy of any person; (d) or, within the period of an absolute term of 21 years, without reference to any life.

707. 'The reason why some kind of limit is prescribed for the vesting of such executory interests, Reason for fixing a limit. is, that executory interests (other than those which are in remainder after or engrafted upon an estate tail, and which were capable of being destroyed by the tenant in tail by means of a recovery,) cannot be destroyed by the prior devisees or legatees; and they therefore tend to a perpetuity, by being unalienable until the contingency happens on which they are to vest in right, which is inconsistent with.

(a) See Fearn, 566, note, and 567, note. And see Fearn, 429—443.

(b) *Long v. Blackall*, 7 Durn. & East, 106, as stated, Fearn, 434, note (1).

(c) Lord Eldon in *Theellusson v. Woodford*, 11 Ves. 146.

(d) *Bengough v. Edridge*, 1 Sim. 373; S. C. nom. *Cadell v. Palmer*, 1 Clark & Fin. 372, and 10 Bing. 140.

the welfare of the state, and therefore contrary to the policy of the law.(f)

Reason for Nor have the particular limits so prescribed been 708
adopting the arbitrarily adopted. The Court, in setting the
limits fixed bounds they have to the suspension of the vesting, have
by the rule. been governed by analogy to the case of a strict entail,
which could not be protected from fines and recoveries,
longer than for the life of the tenant for life in possession,
and the attainment of 21 by the first issue in tail.(g)

SECTION THE SECOND.

Rules of a more Specific Character for determining whether or not a Limitation is too Remote.

I. Limitation I. It will appear from the above statement of the 709
must be such rule, that to render a gift valid, it is not enough
as must take that it may take effect within a life or lives in being and 21
effect within years afterwards; or, that, in the events which have happen-
the prescribed ed, it would take effect within that period, though, under
period. other circumstances, it might not: it must have been so
limited; that, from the first moment of its limitation, it may
be said that it will necessarily take effect, if at all, within
one of the periods above mentioned.(h)

Hence limi- And hence, it follows, that real or personal estate 710
tations to cannot be limited to the children of a person who
children of is not in esse at the date of the will, so as to enable such
persons not children to take as purchasers, even though their parent may
in esse at the happen to be born before the death of the testator, unless
[393] the testator expressly limits the property to the children of
date of will, a person who shall be born in his, the testator's, lifetime.

are not good. Thus, where a testatrix gave one moiety of a certain
Arnold v. amount of stock to her son's eldest male child living at her
Congress, 1 demise, for life; with remainder to the issue of that male
Russ. & M. child; and the other moiety to the other unborn children of
209. her son, for life; with remainder to their issue. The limitation
to the issue of her son's eldest male child was held good;
because, the testatrix, by adding the qualification "living at
my demise," had confined the vesting of the interest of that
male child's issue to the period prescribed by the rule against
perpetuities. But, the limitations to the issue of the other
unborn children of her son were void, though such children
happened to be born in the lifetime of the testatrix, because,
the birth and death of such other unborn children of the tes-
tatrix's son; and the birth of their issue, might not have hap-
pened within the period of a life or lives in being, and 21
years afterwards.

(f) See Fearn, 418—428, and 556—567, note.

(g) Fearn, 444, note.(a), and 566, note.

(h) See *Palmer v. Holford*, 4 Russ. 403.

710a And "as the law does not permit to be done Nor are indirectly, what cannot be effected in a direct manner, the rule which forbids the giving of an estate to the issue of an unborn person, equally invalidates a clause in a settlement or will containing limitations to existing persons for life, with remainder to their issue in tail, empowering trustees, on the birth of each tenant in tail, to revoke the uses; and limit an estate for life to such infant, with remainder to his issue." (i)

711 II. But, it will appear, from the above statement of the rule, that limitations to the unborn children of persons *in esse*, at the date of the deed or will, whatever may be the quantity of the interest limited to them, are not too remote, inasmuch as such unborn children must come into existence, if at all, within the compass of a life in being, namely, the life of their parent.

712 There are, indeed, certain dicta, and, in fact, an actual but anomalous decision, which might seem to prove that a life interest cannot be limited to an unborn person, unless at least the remainder vests at the same time. [394]

Thus, where a testatrix, after expressing her desire, that a certain sum should remain in the 3 per cents. for ever, bequeathed the dividends to her seven children, for their lives; and directed, that in case of the decease of any of them, their annuity should devolve among the rest of the surviving children; but, after the decease of the whole of them, then should their children succeed severally to the annuity of their deceased parent; and, after the decease of her seven children's children, the dividend arising from the above sum should devolve in annuities upon her lawful heirs for ever. It has been thought that a life interest cannot be limited to an unborn person: *Hayes v. Hayes*, 4 Russ. 311.

Sir John Leach, M. R., said, "The true effect of this will is, a limitation to the seven children for life; with remainder to their children, whether born or unborn at the death of the testatrix, for their lives; with a contingent remainder over to persons who shall answer a particular description, at the death of the surviving grandchild. This is plainly too remote. You cannot limit to an unborn person for life, unless the remainder vests in interest at the same time. The gift to the children of the children is therefore void: and the seven children, who take life interests under the will, being the next of kin, are entitled to the remainder, as undisposed of."

This decision, as regards the grandchildren, appears to be clearly erroneous. The gift over to the lawful heirs of the testatrix was obviously too remote. But, in what way the invalidity of that limitation could affect the preceding gift

(i) 1 Jarman on Wills, 247; and *Duke of Marlborough v. Earl Godolphin*, 1 Eden, 404, there cited.

to the grandchildren, it is difficult to understand. "The only effect," (as was contended at the bar) "of the remoteness of that limitation, was, that immediately on the death of the testatrix, the ultimate interest devolved to the next of kin, subject to vested life interests in her children, and contingent life estates to unborn grandchildren." Had there been no limitation after the gift to the grandchildren, that gift would have been clearly valid. And if the only limitation after such gift was void, that gift must have been as valid as if no such subsequent limitation had ever existed. This decision, then, must be regarded as contrariant to principle, and it is also opposed to the current of authorities. A learned author^(k) has remarked, that 713

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An estate for life may be limited to an unborn person.

the validity of a devise to an unborn person for life, seems to have been settled so long as the early case of *Cotton v. Heath*;^(l) and he refers to several cases where it was assumed, in the discussion of some other question, without even an attempt being made to impeach the validity of the gift.^(m) And he adds, that the validity of such a devise is treated by Fearn⁽ⁿ⁾ "as a point rather to be taken for granted, than discussed."

III. Limitations on an indefinite failure of issue.

III. It is obvious that if a limitation is to take effect on an indefinite failure of issue in general, or of issue male or female, or by a particular marriage, and not merely on a failure of issue within a life or lives in being and 21 years and a few months afterwards;^(o) it is within the foregoing rule against perpetuities, and therefore void for remoteness;^(p) unless it is a remainder after, or a limitation engrafted on an estate tail; or a limitation of a sum of money to be raised by means of a term in remainder after an estate tail;^(q) or a limitation over of a term which is 714

See § 706-7.

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(k) Jarman on Wills, 340.

(l) 1 Roll. Ab. 612, pl. 3.

(m) Namely, *Doe d. Tooley, v. Gunnis*, 4 Taunt. 313; *Doe d. Liversage v. Vaughan*, 1 Dowl. & R. 52; S. C. 5 B. & Ald. 464; *Ashley v. Ashley*, 6 Sim. 358; *Denn d. Briddon v. Page*, 3 D. & E. 87 n.; 11 East, 603; *Hay v. Earl of Coventry*, 3 D. & E. 83; *Foster v. Lord Romney*, 11 East, 594; *Bennett v. Lowe*, 5 Moo. & Pay. 485.

(n) Fearn, 503.

(o) *Duke of Norfolk's Case*, 3 Chan. Cas. 1; Pollex, 223; and *Lamb v. Archer*, 1 Salk. 225, as stated, Fearn, 469, 470; and *Southey v. Lord Somerville*, 13 Ves. 486. See also *Nichols v. Hooper*, 1 P. W. 198; *Target v. Gaunt*, 1 P. W. 432; *Keily v. Fowler*, 6 Bro. Parl. Ca. 309; and other cases, stated, Fearn, 471—473, and *supra*, Part II. c. XVII. sect. I.

(p) *Burford v. Lee*, 2 Freem. 210; and *Beaucherk v. Dormer*, 2 Atk. 308; as stated, Fearn, 480—2.

(q) *Goodwin v. Clarke*, 1 Lev. 35, as stated, Fearn, 476.

determinable on the dropping of a life or lives in being,^(r) where a tenant right of renewal does not exist.^(s)

715 Here two preliminary questions may present themselves: First, Whether the words really, and not merely apparently, import such an indefinite failure of issue? Secondly, Whether (if they do)
716 an estate tail is created? Because, if the words do not import such indefinite failure of issue, or if an estate tail is created; in either of these cases, the limitation may be good.

717 The reader will find an answer to these questions in the first section of the seventeenth chapter of the Second Part, so far as regards real estate.

718 And, as regards the application of the first question to personal estate, the answer to it will be found in the rules in the same section. Answer to the first question as regards personal estate.

719 As regards the application of the second question to personal estate, (namely, whether an estate tail is created?) we have seen in the eighteenth chapter of the Second Part, that personal estate cannot be entailed, and that, with the exception of the words "die without leaving issue," the same words which would create an estate tail by implication in real estate, in favour of the person the failure of whose issue is spoken of, will serve to confer on him the absolute interest in personal estate; and consequently, that the limitation over of personal estate on an indefinite failure of his issue, instead of being good as a remainder after an estate tail, as we have seen it would be in the case of real estate, is a conditional limitation, (See § 143—158,) which is void for remoteness. Personal estate cannot be entailed, and a limitation over on an indefinite failure of issue, is void for remoteness.

But, as regards the construction of a limitation over of personal estate in the event of death without issue, it makes no difference whether the first taker has a life estate only, or whether he is held to take a *quasi* estate tail,^(t) which amounts to the same as a limitation of the absolute interest. In either case, the limitation over is void for remoteness, unless it can be collected from the words of the will, that the testator meant a death without issue at the time of the death of the first taker.

A testator gave the interest of his residuary personal estate to A., for life; and then, the residue to her nieces; but, if they die without issue, over. The Lord Chancellor held, that the limitation over was too remote; and that on the death of the aunt, the nieces took the whole. *Everest v. Gell*, 1 Ves. 266.

(r) See Fearn, 489.

(s) See Fearn, 500, note (c), and Reporter's Observations on *Duke of Grafton v. Hanmer*, 3 P. W. 266, in the note, as cited, Fearn, 497.

(t) *Lepine v. Ferard*, 2 Russ. & M. 378.

Chandless v. Price, 3 Ves. 98. So where a testator gave all the residue of his real and personal property, on failure of legitimate issue by his daughter *M. W.*, to his daughter-in-law, *C. J.*; and, after her decease, without legitimate issue, to *S. M.* Lord

See § 593—Loughborough, C., said, that where words would create an estate tail in real estate, whether express or implied, they

See § 100-3. give the absolute interest in personalty, unless words can be found in the will "to tie it up," i. e. to confine the interest to a mere tenancy for life; and that consequently the limitation to *S. M.* was too remote.

Campbell v. Harding, 2 Russ. & M. 411; *Candy v. Campbell*, 2 Clark & Fin. 421. So where a testator gave to his natural daughter, a sum of stock, and his house and land at C.; but, in case of her death without lawful issue, then, he willed the money so left to her to be equally divided between his nephews and nieces who might be living at the time, and the land at C. to his nephew. And he directed, that if she should marry, the property should be solely settled upon herself and children, and in no way changed or alienated. It was decided by the Vice-Chancellor, and afterwards by Lord Brougham, C., and subsequently, upon appeal, by the House of Lords, that the daughter took the absolute interest in the stock, and that the bequest over was void for remoteness.

The grounds of the decision were in substance these:—That the expression "living at the time," being elliptical, so far from aiding the case, by pointing out at what time the contemplated failure of issue was to take place, itself required explanation by means of the next antecedent; and that antecedent was the daughter's "death without issue," And that as the authorities showed that the expression, "death without issue," denoted, of itself, an indefinite failure of issue, it necessarily followed, that the expression "living at the time," (i. e. of the daughter's death without issue) referred to a living at the time when there should be an indefinite failure of issue.

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Monkhouse v. Monkhouse, 3 Sim. 119. Again, where a testator bequeathed personal property to *J. A.*, eldest son of *M. M.*, for life; and, after his death, to his eldest son lawfully begotten, for life; and to remain entailed on the eldest son descended from the same *J. A.* and his posterity from one generation to another for ever. But in case of death or want of issue from *J. A.*, then, to the second son of *M. M.*, and to his descendants, as above mentioned, from one generation to another for ever. And in case of his death or want of issue, to the third son; or, if no son, to a daughter, and to her descendants, in manner before mentioned. *J. A.* died intestate, and without having been married. The Vice-Chancellor said, that the testator had not spoken of any son except the eldest; but it appeared he meant all the sons of *J. A.* to take; for, in the bequest to

M., his expression is, "and to his descendants as above mentioned;" and therefore it must be taken as if he had given the property to J. A., for life; with remainder to his first and other sons in tail. And that as there was no gift over except in the event of a general failure of issue of the sons of J. A., the bequests over were void for remoteness.

And where a testator gave the profits of his business, if *Dunk v.* continued by his executors, and the interest of the monies *Fenner*, 2 arising from the sale of it, if disposed of, and also the interest of the securities on which the rest of his capital should 566.

be invested, to his daughter, for life: her receipt to be a discharge. He then gave her the rents and profits of all his real estates, during her life; and, at her decease, he devised and bequeathed to her heirs, all his estates real and personal, as tenants in common: should his daughter have but one child, such child to possess the whole; but, if she should die without issue, then, at her decease, he gave certain legacies. He next directed, that, at his daughter's decease without issue, all his effects should be sold, and the said legacies paid, and a sum sufficient to produce 150*l.* a year, should be invested, and the interest paid to her husband for life. He then ordered, that all his real estates should be sold, at the decease of his daughter, or at the decease of his brother and sisters, according as a particular event might turn out; and he gave over to certain persons, all the residue of his personal estate, including the proceeds of the sale of the real estate when sold, and the rents of them until they were sold. The daughter died without having had issue. Sir John Leach, M. R., held, on the authority of *Jessan v. Wright*, 2 Bligh, 1, that the daughter took an estate tail in the freeholds, on the ground, that the testator intended that all the issue of his daughter should fail before the estate should go over. And, with regard to the personal estate, he held, that as it was the plain intention, in the limitations over, that the real and personal estate should go together, the words must receive the same construction as to both estates; and consequently, the daughter took an absolute interest in the personal estate.

It was urged at the bar, and it would seem justly urged, *Observations* that the context showed, that the words "die without issue" on *Dunk v.* denoted, not an indefinite failure of issue, but merely a *Fenner* failure of issue at her death: for, the testator immediately proceeds, "then, at her decease, I give to my brother-in-law &c. 100*l.* each." (2 Russ. & M. 561, 559.) And though, in the next sentence, the testator directed that the legacies should be paid at "his daughter's decease without issue," thereby going back to the generality of the first words, "die without issue;" yet, in the same sentence, and in the same event, he directs an annuity to be paid to her husband, for

his life, which clearly shows that he referred to a failure of issue at her decease.

IV. Limita-
over on
[400]
failure of
heirs.

IV. As a general rule, "a limitation over on a failure of heirs, is void for remoteness.^(u) Two exceptions, however, occur to this: first, "where the limitation over is on failure of heirs of a prior taker; and the limitation over is made to an individual who is a relation of, and capable of being collateral heir to, the person whose failure of heirs is referred to: (x) secondly, "where the limitation over is on failure of heirs of a prior taker, and the limitation over is to the heirs of the testator, and they must also be heirs of the prior taker: (y) In each of these cases, it is evident, that by heirs, the testator meant heirs of the body; and that the limitation over is a remainder after an estate tail.

See § 706-7.

Griffiths v. Grieve, 1 Jac. & Walk. 31.

A testator gave the residue of his real and personal estate to his nephew, *A.*, for life; remainder to his children; but, if he should die without children living at his death, to his niece, *B.*, for life; remainder to her children: and, if she should die without children living at her death, then, to her heirs, executors, administrators, and assigns. And, by a codicil, he gave the same to the City of Aberdeen, after the decease of the before mentioned persons in his will, *A.* and his heirs for ever, and *B.* and her heirs for ever. Lord Eldon, C., held, that the gift over of the personal estate to the City of Aberdeen was void for remoteness, inasmuch as the word heirs did not mean children only; and even if it was not used in its strict sense, it certainly was co-extensive with the word issue, and the testator did not contemplate giving over the property to the City, till a failure of all the descendants of *A.* and *B.*

V. Trusts of
a term limited
previous
to an estate
tail.

V. "The trusts of a term limited previous to an estate tail, for raising portions on the failure of issue inheritable under the entail, are too remote: because, the term being limited antecedently to the estate tail could not be defeated by a recovery; so that even after a recovery had been suffered, there would remain trusts to be performed on an event which might not happen till a very remote period. (z)

[401]

VI, Interests
to vest on

VI. Where the property is to vest only in a person who shall sustain a certain character, (as,

(u) *Tilbury v. Barbut*, 3 Atk. 617; *Right or Wright v. Hammond*, 1 Stra. 427; and *Att.-General v. Gill*, 2 P. W. 389; as stated, *Fearne*, 446, 456, 467—8. *Crooke v. De Vande*, 9 Ves. 197, as stated, *Fearne*, 475, note (s).

(x) *Webb v. Hearing*, 3 Lev. 470; and *Tyle v. Willis*, Cas. temp. Talbot, 1; as stated, *Fearne*, 467.

(y) *Nottingham v. Jennings*, 1 P. W. 23, as stated, *Fearne*, 467.

(z) *Case v. Drosier*, 2 Keen, 764.

for instance, in a person who shall bear a given title, or * be in the sustain-
holy orders, (a) or be a tenant in tail of the age of 21; and ing a certain
no person sustaining such character may be in existence character.
within the period fixed by the general rule against perpe-
tuities; the limitation, unless it is by way of executory trust, See § 706.
is void for remoteness.

Vere, Lord Vere, bequeathed certain chattels to trustees, *Lord Deer-*
in trust for his wife, for life; and, after her decease, for his *hurst v. The*
son, for life; and after the decease of the survivor of them, *Duke of St.*
in trust for such person as should from time to time be Lord *Alban's*, 5
Vere; it being his will and intention and sole motive for *Mad. 232;*
making that disposition, that the same should, after the de- *S. C. nom.*
cease of his wife, from time to time go and be held and *Tollemache*
enjoyed with the title of the family, as far as the rules of *v. Coventry,*
law and equity would permit. The testator left his wife *2 Clark &*
and son surviving him, and also two sons of his son. After *Fin. 611.*
the death of his wife and son, the eldest grandson succeeded
to the title and the chattels, and became third Lord Vere,
and died, leaving an infant son, who then, succeeded to the
title as fourth Lord Vere, and died an infant and unmarried,
leaving the second grandson of the testator surviving him.
It was held by the Vice-Chancellor, and by Lord Lyndhurst,
C., on appeal, that the administratrix of the fourth Lord
Vere was absolutely entitled to the chattels. But it was
decided by the House of Lords, that the chattels vested
absolutely in the third Lord Vere, the eldest grandson of
the testator. Lord Cottenham, who had succeeded Lord
Lyndhurst, proposed that decision on the ground, that
though the individuals who afterwards happened to be the
second and third Lords Vere were in existence at the testa-
tor's death, as individuals; yet, that the Lords Vere, as
peers, were not in existence at that time; and, in conse-
quence of attainder and abeyance, no Lord Vere might
have happened to come into existence for an indefinite
number of years; and therefore, the executory bequest over
to such person as should be Lord Vere, was void for remote-
ness, as regarded the fourth and succeeding Lords Vere, if
not as regarded even the third Lord Vere.

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And where a testator devised his reversion in fee in his *Ibbetson v.*
mansion to his brother, for life; remainder to his first and *Ibbetson*, 10
other sons in tail male; with divers remainders over. And *Sim. 495.*
he bequeathed his plate, pictures, &c., in and about his
mansion, to trustees, in trust to permit the same to be used
and enjoyed by the person and persons who for the time
being should be in possession of his mansion, under the

(a) *Proctor v. Bp. of Bath and Wells*, 2 H. Blac. 356, as stated, Fearnce, 510, note (k).

settlement on his marriage, or the limitations contained in his will, until a tenant in tail of the age of 21 years should be in possession of his mansion; and then, the plate, pictures, &c., were to go and belong to such tenant in tail. A tenant in tail, of the age of 21 years, namely, the brother's eldest son, became possessed of the mansion within 21 years from the death of the testator. Yet, Sir L. Shadwell, V.C., held, that the trust declared of the plate, pictures, &c., was void for remoteness, so far as it was to take effect after the death of the brother; since the suspension of the vesting of the chattels might endure for ages; and the validity of the gift must be determined by considering how it stood at the death of the testator; and unless it was then such, that if it ever took effect at all, it must of necessity have vested the absolute interest in some one within the period allowed by law, it was bad then, and must ever be so. And this decision was affirmed by the Lord Chancellor.

Banks v. Le Despencer, 10 Sim. 576.

But where a nobleman conveyed real estates to trustees, in trust, after the death of himself and his eldest son, to settle such estates, so that the same should, so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a lineal descendant of the settlor; and that during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents and profits of the same premises should or might be equally divided among the co-heirs *per stirpes* of the person or persons by reason of whose death or deaths without issue male such suspension or abeyance should be for the time being occasioned. This being an executory trust, Sir L. Shadwell, V.C., held, that it was not void for remoteness; and the Master was directed to approve of a proper settlement according to the language of the trust.

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VII. Where the vesting of a devise or bequest to a class is suspended till a certain age, and some of them may not be in esse till too remote a period.

Leake v. Robinson, 2

VII. Where real or personal estate is devised or bequeathed to a class of persons, and the vesting is suspended until a certain age, and some of the class may possibly not come into existence till so late a period, that the gift to them may be too remote; in such case, the gift to the whole class will be void for remoteness: because, it was intended that the whole class should take, as a class, and not that some of them should take, in exclusion of others. (See § 706.)

722

A testator gave real and personal estate to trustees, to apply the rents and interest, or such parts as they should think proper, towards the maintenance, education, or advancement of his grandson, *W. R. R.*, until 25; and, after his attaining that age, to pay to or permit him to receive

the same during her life; and, after his death, to pay the same or such part &c. for the maintenance &c. of all his children, until, being sons, they should attain 25, or, being daughters, they should attain such age or marry; and then, to transfer and assign to such children who should attain such age or marry as aforesaid. And he directed, that in case *W. R. R.* should die without leaving issue living at his decease, or, leaving such, they all should die before attaining 25, or, being married as aforesaid, then, the trustees should apply the real and personal estate unto all the brothers and sisters of *W. R. R.*, share and share alike, upon attaining 25 or marriage, as aforesaid. The testator then gave the residue upon trust to pay one moiety of the rents and interest to his daughter *R.*, for life; and, after her death, to her husband, for life; and, after the death of the survivors, for the maintenance &c. of the children of *R.*, (except *W. R. R.*) in the same manner as in the former gift: and, as to the other moiety, upon like trusts for his daughter *M.*, her husband and children. And the testator directed, that in case of the death of any of his said grandchildren before 25 or marriage, the shares of them so dying should go to the survivors; and, in case of the death of either of his said daughters without leaving issue by her said husband living at her decease, her share should go to the issue of his surviving daughter. *W. R. R.* died unmarried. At the date of the will, he had a brother and three sisters living. Two other brothers were born after the testator's death, and before the death of *W. R. R.*; and afterwards, another sister. Sir W. Grant, M. R., held, that the particular bequests and the bequests of the moieties of the residue to the children of *R.* and *M.* were void for remoteness; that so far as the particular bequests were ill disposed of, they fell into the residue; and that as *M.* had died leaving issue, her moiety belonged to the next of kin; and that the moiety of *R.* rested in contingency during the life of *R.*; and if she should die without leaving issue, it would go over to the children of *M.*, the word "surviving" meaning "other;" but if she should die leaving issue, it would belong to the next of kin. His Honour observed, that the vesting was in every instance suspended till 25, there being no gift antecedent to the direction to pay and transfer at that age (2 Meriv. 385;) and the circumstances, that the testator unnecessarily provided for survivorship; that he had spoken of shares of grandchildren dying under 25; and that, in the last proviso, he had given over the moieties of the residue only in the event of either of his daughters dying without leaving issue—did not affect the question of vesting; as none of these clauses made any new gift to the grandchildren, or altered the terms or conditions of that which had

Meriv. 363.
See also
Vawdry v. Geddes, 1 Russ. & M. 203, stated § 368.
Judd v. Judd, 3 Sim. 525; and
Hunter v. Judd, 4 Sim. 455; stated § 362.
Bull v. Pritchard, 1 Russ. 213, stated § 366.

been already made. (*Ib.* 388.) That wherever a testator gives to a parent for life, with remainder to his children, he means to include all the children such parent may at any time have. (*Ib.* 382.) That assuming, therefore, that children born after the death of the testator were to be let in, and that the vesting was not to take place till 25, the limitation to the brothers and sisters of *W. R. R.* were wholly void for remoteness, unless the Court could distinguish between children born before, and those born after the testator's death. (*Ib.* 388.) That the alteration which this would involve would only give the bequests a partial effect, and that too by making a distinction, which the testator never intended to make, between those who were the equal objects of his bounty. (*Ib.* 389.) That the bequests were not made to individuals, but to classes; and what he had to determine was, whether the class could take. (*Ib.* 390.) That in *Jee v. Audley*, 1 Cox, 324, there were no afterborn children, and yet the mere possibility that there might have been, was sufficient to exclude those who were capable of taking. (*Ib.* 390, 391.)

Porter v.
Fox, 6 Sim.
485.

Again, where a testator gave annuities to his widow and son, and directed that the surplus income of his real and personal estate should be invested in stock, and the dividends accumulated, and to be and remain assets for improvement for the benefit of such surviving child or children as after-mentioned. And he directed his trustees, after the death of his widow and son, to sell his real estate, and invest the produce in stock as aforesaid, to be and remain assets for improvement for the benefit of his grandchildren and his nephew *T. O.*, and to be distributed in manner and form following, that is to say, as they should become of the age of 25 years respectively. Two grandchildren were born in the testator's lifetime, and another after his decease. His nephew *T. O.* was 19 years of age at the date of the will. It was argued, that there was, first, a gift of the property for the benefit of the grandchildren and *T. O.*; and then the time for distribution followed in a separate sentence. That, at all events, *T. O.* was entitled to a share in proportion to the number of the grandchildren; for, it did not follow, because he was named with persons whose legacies were void for remoteness; that he was not to take. But Sir L. Shadwell, V. C., said, that the distribution was part of the gift. That the testator used the word children as comprehending the children of his son, and also the child of his nephew. That he meant that the right of each child should depend on there being a class formed [as fully appeared from the subsequent words]. That the first members of that class should take a share, the amount of which should be determined by the number of individuals then constituting the

class. And that if the whole intention could not prevail, effect could not be given to any part of it. His Honour added, that there were several passages in the judgment in *Leach v. Robinson*, which exactly applied in spirit to this will.

So where a testator gave 30,000*l.* to the children of his daughter who should be living at the time the eldest should be 24, and the issue of such of them as might be then dead, to be paid to them when and as they should attain 24; but without interest in the meantime. Sir L. Shadwell, V. C., held, that the bequest was void for remoteness. *Dodd v. Wake*, 8 Sim. 615.

So where a testator, after devising lands to his son for life, directed his trustees to stand possessed of the proceeds of the sale thereof, in trust for all his grandchildren, the children of his son and three daughters, who should attain 24. The son and daughters had children living at the testator's death, and no other children were born afterwards. Sir L. Shadwell, V. C., held, that the trust was void for remoteness. *Newman v. Newman*, 10 Sim. 51.

And where a testator devised his real and personal estate upon trust to sell, and invest so much of the produce as should be sufficient to raise three annuities of 100*l.*, and to apply one of such annuities towards the maintenance of his grandchildren, the children of his daughter *H.* deceased, until the youngest should attain 23; and then he directed that the principal sum invested for the purpose of raising the annuity should be paid and divided unto and equally among his last mentioned grandchildren. And, upon further trust, to pay to each of his daughters *C.* and *W.*, for their lives, the like annuity of 100*l.* And, as to each of such principal sums as should have been invested for the purpose of raising the last mentioned annuities, he directed his trustees to divide them, from and immediately after the death of *C.* and *W.* equally among all the children of *C.* and *W.* then living or thereafter to be born. And he directed that the shares (subject and without prejudice to the life interest of his daughters) of all his grandchildren, should be paid to such grandchildren at 23, in the case of sons, and at 23 or marriage, in the case of daughters. Provided that the share of each should be a vested and transferable interest in each grandchild, being a son, on his attaining 23 or leaving issue at his decease, and in each grandchild, being a daughter, on her attaining that age or marrying. Then followed a clause of survivorship, and a clause of maintenance. There were five children, and three of them attained 23; of whom *J. H.* died, after surviving *M. H.*, who died under 23, and predeceasing *D. H.*, who died under that age. It was held, that *J. H.* took an original one fifth share of the annuity fund provided for the children of *H.*, and one third of *M. H.*'s share, but no part of *D.*'s share; the words "survivors and" *Cromek v. Lumb*, 3 You. & C. 565.

survivor" being used in their natural sense. It was also held, that the limitations of the annuity fund from which *C.* and *W.* derived their life annuities, were void for remoteness, even as to the children of *C.* and *W.* living at the date of the will.

Distinction suggested, that some should take under the will, where none could take in case of an intestacy; but that none should take under the will, where they could all take in case of an intestacy.

At first sight, it would seem; that, as a general rule, the Court should give effect to the disposition of the will, in favour of as many of the class as could lawfully take; and that, though the testator did not intend to draw any distinction between persons who were equally the objects of his bounty, yet, if it became a question whether all should take under the will, or none, he would prefer, that, at all events, some should be admitted, if all could not. And this, in fact, would surely be the intention of the testator, if the objects of his bounty would be deprived of his property altogether, unless they could take under the will; as, where they are all strangers, or such relatives as are not the persons to whom the statute of distributions would give it in the event of his intestacy. But, where they would take in case of an intestacy, and it therefore would not be a question, whether all should take, or none, but merely a question, whether all should take *under the will*, or none; there, as a general rule, it would seem that the testator would prefer, that none should take by the will, but that the succession should be left to the disposition made by the statute of distributions. Suppose, for instance, the testator gives the ultimate interest, subject to the life interest of a prior legatee, to a class of persons who are his next of kin: his intention, if his personal estate were not exhausted by his debts, would be effectuated, if none were allowed to take under the will, though the bequest would fail; whereas, if some only were allowed to take under the will, his intention that all should take, would be defeated. Would it not, therefore, be a just distinction to allow those individuals of the class to take, who lawfully could take, where they would otherwise be entirely deprived of the property intended for them; but to admit none of the class under the will, where they would all take under the statute? This suggestion is thrown out with great diffidence, as apparently founded in common sense, and in furtherance of the real intention, which is the governing principle in the construction of wills.

Objection answered.

It may be objected, that the validity or invalidity of the dispositions of a will ought not to depend on the character of the objects, when they are not, in themselves, incapable of the testator's bounty. But, why should not a testamentary disposition be dependent on the character of the objects, just as much as upon the nature of the subjects, as in cases where the words "leaving issue,"

are interpreted in regard to personal estate, in a different manner from that in which they are interpreted in regard to real estate. No evil of uncertainty arises, it would seem, in either case; because, the character of the objects and the nature of the subject is known at once, and remains unchangeable. And therefore, it is not like determining the validity or invalidity of a limitation, according to the events that happen after the testator's death; for, in that case, the limitation might be regarded as invalid one hour and valid the next, which would be productive of the greatest mischief.

Again, why should not the Court admit some of a class, and exclude others on the ground of remoteness, when, in numerous instances, it has admitted some of a class, and excluded others, on the ground of inconvenience? See § 227-230c.

725

VIII. Where a testator expressly confines his bounty to a certain description of persons among a given class, evidently for the purpose of avoiding a transgression of the limits prescribed by the rule against perpetuities, and yet makes the limitation over depend in terms upon the failure of the whole class, without restriction; the limitation over will be so construed as to be capable of taking effect simply on failure of those of the class who are to take under the express limitations, especially if the testator excludes some of the class, irrespectively of the rule against perpetuities. And, for the purpose of this construction, the word "such," or "said," will, if necessary, be supplied. [409]

A testator bequeathed all the residue of his personal estate, upon trust, for his grandson *B.*, the son of his son *Isaac*, at 25, for life; and, after the death of *B.*, in case he should have a son who should attain 21, then, for such son of *B.*, who should first attain 21, absolutely; and, in case *B.* should have no son who should attain 21, upon trust for the testator's grandson, *J.*, the son of *Isaac*, at 25, for life; and, after the death of *J.*, in case he should have a son who should attain 21, then for such son, absolutely; with the like limitations successively in favour of any other grandsons, sons of *Isaac*, born in the testator's lifetime, and their respective sons first attaining 21; and in case no son of *Isaac*, then born, or to be born in the testator's lifetime, should have a son who should live to attain 21, then, upon trust for any son of *Isaac* born after the testator's decease who should first attain 21, absolutely; and, in case no son of any son of *Isaac* born in the testator's lifetime, nor any son of *Isaac* born after the testator's decease, should live to attain the age of 21 years, then, from and immediately after the decease of all the sons and grandsons of *Isaac*, upon trust for the testator's nephew *G.*, for life; and, upon *G.*'s decease, in trust for such son of *G.* as should first attain 21. See § 706. *Ellicombe v. Gompertz*, 3 M. & C. 127.

Lord Cottenham, C., held, that the words, "after the decease of all the sons and grandsons," must be read as if they had been "after the decease of all the *said*," or "all *such* sons and grandsons;" and, therefore, that the limitation over, in favour of the first son of G., was not too remote. It was obvious, from the provisions preceding the limitations over in favour of G. and his son, that the author of the will knew well to what extent the law would permit the vesting of the residue to be postponed; and that he had framed those provisions accordingly; and hence, it would be unreasonable to suppose that he intended to transgress those bounds by the limitations over to G. and his son. (3 M. & C. 147.) Besides, it was evident that all the grandsons of Isaac were not to take: for, of all the grandsons of Isaac who might come in *esse*, the testator fixed upon one only, who, to become entitled, must have attained 21, and have been born of a father himself born in the testator's lifetime. (*Ib.* 148.) And as it was clear that the whole of the class were not to take, the gift over, though made to depend upon the failure of the whole class, was to be construed to take place upon the failure of that description of the class who were to take; (*Ib.* 151:) for, there could be no motive for postponing it for any longer period than was necessary to let in those who were the prior objects of the testator's bounty. (*Ib.* 138, 148.)

IX. Where a testator gives to some only of a class, without transgressing the rule against perpetuities, but, in terms, limits over on failure of the whole class, and yet apparently intended to create a mere alternative interest.

Trickey v. Trickey, 3 M. & K. 560.

IX. Where the prior limitations are confined to a certain description of persons among a given class; and the persons falling within such description may take, without transgressing the rule against perpetuities; and there is a limitation over, which was apparently intended to take effect, as an alternative limitation, in the event of the non-existence of the persons so described, though, in terms, it is only to take effect in case of a failure of the whole class; it will be treated as an alternative limitation, to take effect in the above-mentioned event, and therefore as not void for remoteness. (See § 128, 706.)

A testator bequeathed the residue of his personal estate to trustees, in trust for his daughter, for life; remainder to her children, at 21; and, in case any or either of the said children should die under the said age, and have one or more child or children who should survive his said daughter, and live to attain the said age, such last mentioned child or children should be entitled to his or their parent's share; with an ultimate limitation over, if there should be no child of his said daughter, or, there being any such, no one of them should live to attain the age of 21 years, nor leave any issue who should attain thereto. Sir John Leach, M. R., held, that as the first provision in favour of the children of the child of the daughter who should die under 21, was confined

to such grandchildren, [of the daughter] as should survive the daughter; so, in the subsequent passages, the testator was to be understood to speak of such grandchildren only; and therefore the limitation over being to take effect upon failure of grandchildren [of the daughter] who should survive the daughter, and not live to attain 21, was not too remote, as it extended only to a life in being, and 21 years.

727 X. Where a prior limitation depends on too X. When an remote an event; and there is an alternative alternative limitation which depends simply on the non-happening limitation is of that event; and it is possible, at the date of the instru- void for re- ment, that it may not be decided, within the period pre- moteness. scribed by the rule against perpetuities, whether or not such See § 706. event will or will not happen; in such case, the alternative limitation is void, as well as the prior limitation; because, each See § 128-186. is in fact limited on too remote a contingency. (b)

728 XI. In the case of a particular or qualified XI. Interests power of appointing real or personal estate, that under par- is, a power of appointing it to or among particular objects ticular or only; no estate or interest created by the exercise of the qualified power, will be good, unless it might have been created by powers must be such as would have been good if created by the deed or will itself conferring the power. So that, limi- tations which would have been void for remoteness, if in- serted in an instrument conferring a particular power, will also be void for remoteness, if inserted in the instrument by which the power is exercised. And hence, estates or inter- ests cannot be appointed under a particular or qualified power, to any persons, as purchasers, who are the children of persons not in being at the time of the execution of the deed or at the date of the will. See § 706-710.

729 XII. But, in the case of a general power, that XII. But in- is, a power of appointing the fee to any one whom terests under the donee of the power thinks proper; it is not necessary general [412] that the estates created by the exercise of the power, should be such as would be good if created by the deed or will conferring the power. powers need not be of such a cha- racter.

730 The reason of this difference is, that in the case of a particular power, the specification of the ob- ject takes the land out of commerce or locks up the capital, Reason of and tends to a perpetuity. Whereas, there is no tendency the above to a perpetuity in a general power, as it enables the party to distinction. vest the whole fee in himself, or in any other person, and to liberate the estate entirely from every species of restriction, through the medium of a seisin previously created and vested

(b) See *Proctor v. The Bishop of Bath and Wells*, 2 H. Black. 358; and *Cambridge v. Row*, 8 Ves. 12—24; as stated, *Fearne*, 508, note (b).

in other persons, to the same unlimited extent as he could have done by a conveyance of the land itself, if the seisin had been vested in him, instead of being vested in others to such uses as he should appoint.(c)

XIII. Powers XIII. If a power is not to arise till an event 731
to arise on (such as an indefinite failure of issue) that proba-
an indefinite bly may not occur within the period prescribed by the rule;
failure of is- the power and the appointment are both void for remote-
sue. ness, even though it may happen that the event occurs
See § 706. within the prescribed period.

Reason for It would be inconvenient and unreasonable, if 732
the foregoing the power were held to be good, so far as to enable
rule. the donee to make a good appointment in case the event
should occur within the prescribed period: for, according to

See § 79-81. this construction, the vesting in interest of the property, or
See § 269a- the absolute and infeasible vesting thereof, as the case
374. may be, might remain for many years suspended upon an
event which probably would not happen in time for any
appointment to be made.

Bristow v. Boothby, 2 Sim. & Stu. 465. A settlement was made on husband and wife, for their
lives; remainder to the sons, in tail male: remainder to the
daughters, in tail; remainder to the survivor of the husband
and wife, in fee. And it was provided, that in case there
should not be any child or children of the marriage, or, being
such, all of them should die without issue, and the husband
should survive the wife, then it should be lawful for B., the
wife, by deed or will, to charge the premises with 5000*l.*, to
be raised and paid after the decease of the husband and wife
and such failure of issue as aforesaid, to such person as the
wife should direct. There was only one child, who died at
the age of eight years; and the wife afterwards died in the
husband's life-time, having, by her will, exercised the power.
Sir John Leach, V. C., held, that as the estate was not limited
to all the issue of the marriage (the limitation to the sons
being in tail male, and not in tail general) and the power
was to arise on an indefinite failure of issue, it was too re-
mote.

[413] XIV. But, where a power authorises an ap- 733
of appoint- pointment among a class of persons, the power is
ment among good, provided some of the class will probably come into
a class of existence within the period prescribed by the rule, though
persons, others may not; for, in such case, it is sufficient if the actual
some of appointment made in exercise of the power, is confined to
whom will objects who have come or may come into existence within
probably such prescribed period.
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within the period prescribed by the general rule.

(c) See Butler's note, Co. Litt. 271 b. (1) VII. 2, as regards real estate.

734 In this instance, as there will probably be occasion for that suspension of the vesting in interest, of the absolute and indefeasible vesting, which is caused by the creation of the power; in other words, as there will probably be objects to whom a valid appointment may be made, without transgressing the rule against perpetuities, there is no more inconvenience and unreasonableness in allowing such suspension, than there is in the ordinary cases of contingent springing or shifting interests, limited without the medium of a power. Reason for the foregoing rule.
See § 117-127b, 148-158.

A power was given, by a marriage settlement, to the husband and wife, or the survivor, to appoint personal estate among all the children and grandchildren or issue of the marriage. *E. D.*, the wife, survived; and, having (besides other children) a daughter *E.*, who had three children living at her, *E. D.*'s, decease, she appointed part of the money, by will, to *E.* for life, for her separate use; and, after *E.*'s decease, to all her children (and not to the three only who were living at *E. D.*'s death). Sir R. P. Arden, M. R., held, that the power was good; (2 Ves. Jun. 362;) but that the appointment which was actually made, was too remote; and that, on the authority of *Gee v. Audley*, it was therefore void, as to all the children of *E.*; and that it could not be supported in favour of those who were living at the death of *E. D.*; because *E. D.* did not mean those only, but all. (*Ib.* 362—6.) Routledge v. Dorrit, 2 Ves. Jun. 356.

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E. D. made a similar appointment in favour of a son, *R. D.*, and his children. *R. D.* had no children at the death of *E. D.* It was argued that the intention should be executed *cy pres*. The Master of the Rolls said, that where, indeed, real estate is limited to a person unborn, for life; remainder to his first and other sons, in tail; as they cannot take as purchasers, but may as heirs of the body; and as the estate is clearly intended to go in a course of descent; it shall be construed an estate tail in the person to whom it is given for life. But that this mode of executing the intention *cy pres* was not applicable to personal estate; for, the Court could only give the personal estate to the unborn tenant for life, absolutely; and then it would not go in a course of descent, but would go to his executors and be liable to his debts. (*Ib.* 363.)

735 XV. A learned author(d) refers to several XV. Powers cases(e) in proof that a power of sale is valid, of sale, though not restricted to the period allowed by the rule against perpetuities. See § 706.

(d) 1 Jarman on Wills, 250.

(e) *Biddle v. Perkins*, 4 Sim. 135; *Powis v. Capron*, Id. 138 n.; *Waring v. Coventry*, 1 Myl. & K. 249; *Boyce v. Hanning*, 2 Crompt. & Jer. 334; *Holder v. Preston*, 2 Wils. 400.

SECTION THE THIRD.

Certain Points connected with the Doctrine of Remoteness.

I. Where the absolute interest is afterwards restricted to a life interest with a limitation over which is void for remoteness.

Ring v. Hardwick, 2 Beav. 352.

I. WHERE a testator first makes a gift in terms which would carry the absolute interest in chattels, and then proceeds to restrict it to an estate for life; adding a limitation over which is void for remoteness; the entire interest as conferred by the original gift, remains unaffected by the subsequent attempt at restriction. (See § 706.)

A testator bequeathed his residuary personal estate upon trust, for his wife, for life, or during widowhood; and, after her decease or second marriage, upon trust to divide the same between his four children, his two sons, *A.* and *B.*, his two daughters, *C.* and *D.*; the shares of the sons to be paid immediately. And he directed that the shares of his two daughters *C.* and *D.* should be invested for them, for life, and after their respective deaths, divided between their respective children, and to become vested in such children at the age of 25. And that, in case either daughter should die without leaving any child who should live to attain 25, then, the property should go to the children of the others who should attain 25. Lord Langdale, M. R., held that the gift to the children was contingent, notwithstanding the testator had used the word "share," in reference to their interest before 25; and that consequently it was too remote, and the absolute interest remained to the daughters, according to the original gift.

See § 100-3.

II. Remainder after too remote an interest.

III. Money raised by a term well created, the uses whereof are void for remoteness.

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Tregonwell v. Sydenham, 3 Dow. 194.

II. 'Where a limitation is void for remoteness, a limitation in remainder after it, is not accelerated, but is also void. (f)

III. Where a term limited in remainder in trust to raise sums of money, is well created; but the uses for which the money is to be raised, are void for remoteness; and the devisees in remainder after the term, are only to take after the money shall have been raised, or the term determined, the money will belong to the heir at law, as a resulting trust.

A testator, after limiting certain estates for life and in tail, devised the lands to trustees for a term, in trust to raise sums of money for uses which were void on account of their remoteness, and then proceeded to limit other estates "after the said sums should be raised for the said uses, or determination of the said term." The Court of Exchequer made a

(f) *Robinson v. Harcourt*, 2 Bro. C. C. 22; and S. C. 2 Durn. & East, 241, 390, 781; as stated, 1 Jarman on Wills, 243.

decree, whereby they virtually put the term of 60 years entirely out of the will, and gave up the lands to the next tenant for life, as if he had been the immediate devisee. But this decree was reversed by the House of Lords, who held that as the term was well created, and the devisees in remainder after the term, were, by express words, only to take after the money should be raised, or the term determined; the money belonged to the heir at law, as a resulting trust.

CHAPTER THE FIFTH.

[417]

OF THE RESTRAINTS IMPOSED ON THE ACCUMULATION OF THE INCOME OF REAL AND PERSONAL ESTATE; AND OF THE DESTINATION OF INCOME RELEASED FROM ACCUMULATION OR ACCRUING BEFORE THE VESTING OF AN EXECUTORY DEVISE OR BEQUEST.

SECTION THE FIRST.

The Accumulation allowed before the Statute.

738a * BEFORE the passing of the statute 39 & 40 Geo. III. c. 98, a person might suspend the enjoyment of real and personal estate, and direct that the whole of the rents, profits, and produce thereof, should be accumulated, for as long a period as that during which it was allowable to suspend the vesting of the ownership or property of and in such real and personal estate. (a)

But if the accumulation exceeded that period, it was void *in toto*, and not merely as to the excess.

Thus where a term was limited, in trust, during the respective minorities of the respective tenants for life, or in tail, in possession, or entitled to the rents of real estate, to receive and lay out the rents in stock, to accumulate for such person or persons as should, upon the expiration of such minorities or death of the minor or minors, be tenant or tenants in possession or entitled to the rents, and of the age of 21. Sir W. Grant, M. R., held that the trust was altogether void, except so far as it was a trust for the pay- Lord South-
ampton v.
Marquis of
Hertford, 2
V. & B. 54.

(a) See Fearn, 588, note (x); and *Thellusson v. Woodford*, 11 Ves. 112, 146, as stated, Fearn, 436, note (l).

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Marshall v.
Holloway,
2 Swanston,
451.

ment of debts; because it might extend beyond the period allowed for executory devises or trusts for accumulation, in consequence of a succession of minorities. It was argued at the bar, that a series of minorities might prevent alienation in the case of any limitations in tail. But, to this it was justly replied, that the incapacity of alienation in the latter case, is not produced by the parties themselves.

And where a testator devised and bequeathed his real and personal estate, upon trust, to invest the rents and profits and annual proceeds as and when and so often and during all such times as any person or persons beneficially interested in or entitled to any real and personal estates under the trusts afterwards declared, should be under 21; adding all such investment to his personal estate, in order to accumulate the same; and, subject to such trusts and certain others, upon trust for the eldest son, then living, of his daughter, for life; remainder to his first and other sons in tail, with divers remainders over. Provided always, that such person or persons as should be entitled to an estate tail in possession in his said real estate, should not be absolutely entitled to his leasehold and personal estate until he, she, or they respectively should attain 21; and, in the meantime, the said leasehold and personal estates should remain subject to the trusts before declared thereof. The testator then directed, that every person who should become entitled to the possession or the receipt of the rents and profits of his said real and personal estates, should within a year after attaining 21 and so becoming entitled, assume the surname and arms of Holloway. It was argued for the heir-at-law and next of kin, that the proviso gave a direction and operation to every clause, and was to be considered as a part of the gift; and that no person was to derive any benefit before 21; and hence, that no property was intended to vest either in enjoyment or right, before 21. That if the testator had intended an immediate gift, he would have directed an immediate assumption of his name and arms. (2 Swans. 441.) That the words "subject to the trusts," meant "after performance of the trust;" and that all the limitations of the real estate to unborn persons after the first estate for life, being designed not to take effect till after the performance of a trust which was too remote, were void. (*Ib.* 441—2.) Lord Eldon, C., held, that the trust for accumulation was void, because it might last for ages, (*Ib.* 450,) but that the trust to accumulate would not, more than a trust for payment of debts, prevent the vesting; and that the eldest grandson took a vested estate for life, and was entitled in possession to the rents and profits of the real estate, and the dividends, interest, and annual proceeds of the personal estate, and that the remainders over were valid.

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SECTION THE SECOND.

The Periods to which, except in certain cases, Accumulation is restricted by the Stat. 39 & 40 Geo. III. c. 98.

738b. THE mischievous extent to which Mr. Thelusson availed himself of the power of creating an accumulation which formerly existed, gave rise to the statute 39 & 40 Geo. III. c. 98, for preventing the recurrence of a disposition which was alike impolitic and unnatural; as tending to withdraw capital from general circulation, and to keep the nearer relations of a settlor or testator in a state of indigence, for the sake of augmenting the fortunes of some remote and unascertained descendants.

738c. By the first section of that statute, it is enacted, Enactments
"that no person or persons shall . . . settle or thereof.

dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than

"The life or lives of any such grantor or grantors, settlor or settlors,

"Or the term of 21 years from the death of any such grantor, settlor, deviser, or testator,

"Or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser, or testator,

"Or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurance, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated."

SECTION THE THIRD.

[420]

Observations and Decisions respecting the Restrictions imposed by the Statute.

738d. I. ^b THE prohibition of the statute is not confined to an accumulation for the benefit of persons who are not in being or not yet ascertained, though the principle upon which such prohibition is founded certainly applies with more than ordinary force to such cases; but it even affects accumulations in favour of persons who take vested interests, in the funds accumulated, from the very commencement of the accumulation. (b)

I. The statute applies even to accumulations in favour of persons taking vested interests.

(b) See *Shaw v. Rhodes*, 1 M. & C. 135, stated § 738k.

II. It applies even where accumulation is not directed.

See § 741a.

HI. Accumulations are void only as to the eventual excess.

See § 741a.

IV. Accumulation [421] void after 21 years from testator's decease, though it has not lasted that time.

V. Whether accumulation may be made during minority of person not in *esse* at grantor's or testator's death.

II. "The statute applies to such dispositions as have the effect of causing an accumulation, though there may be no direction to accumulate.(c) This is clear from the introductory words of prohibition above quoted; though it is observable, that the clause relating to the destination of the income released from accumulation, only speaks of cases where an accumulation shall be "directed."

III. "It is not required that the whole or even any part of the period of accumulation, should, by force of the provisions of the instrument, necessarily fall within the time allowed by the statute; but the accumulation for any part which, in the events that happen, chances actually to fall within that time, is good.(d) That this is the true construction of the statute, clearly appears from the clause respecting the destination of the income released from accumulation.

IV. As the statute does not allow 21 years' accumulation, unless the 21 years fall within 21 years from the death of the testator; "where a testator directs the accumulation of a fund to commence on an event or at a time subsequent to the death of the testator; the accumulation becomes void at the expiration of 21 years from his decease.(e)

V. If there were no decision to the contrary, it would seem clear that the statute allows an accumulation during the minority of any person who, if of full age, would be entitled to the income accumulated, whether such person was in *esse* or not at the time of the death of the grantor or testator. For, otherwise, the fourth period mentioned in the statute, instead of constituting a distinct period, is in fact included, and specifically, and not merely in effect, included, in the preceding period. So that, according to that construction, the mention of that period would be a mere unmeaning surplusage. And it is observable that the word "only" is added after the word "minorities," in the mention of the period lastly specified in the statute; whereas it is not added after the word "minorities," in the mention of the period previously specified in the statute. This would seem to afford some indication, that by the minorities to which the restrictive word "only" is added, the minorities of persons not in *esse* at the death of the grantor or testator, were meant. For, it would seem that the word

(c) See *McDonald v. Brice*, 2 Keen, 276, stated § 731e.

(d) See *Shaw v. Rhodes*, 1 M. & C. 135, stated § 738k. See also *Griffiths v. Vere*, 9 Ves. 127; and *Longdon v. Simpson*, 12 Ves. 295; and *Crawley v. Crawley*, 7 Sim. 527, stated § 741d.

(e) *Webb v. Webb*, 2 Bear. 493.

"only" was added, to prevent an accumulation during a life or lives in being, in addition to the period of the minority of an unborn person, for which time it was allowable to accumulate before the statute, and to restrict it to the minority or minorities *only* of an *unborn* person or persons.

There is however a decision to the contrary; but it is conceived that it cannot be supported. In that case, the *Haley v. Bannister*, 4 Mad. 278. dividends on a sum of stock were directed to be accumulated till one of the children of A., born, or to be born, should attain 21, at which time the principal was to be transferred to such children. Sir John Leach, V. C., said, "the statute (39 & 40 Geo. III. c. 98) prevents an accumulation of interest during the minority of an unborn child; but, as to the principal, the law remains as before the statute. The excess of accumulation prohibited by the statute, would form part of the residue." [422]

SECTION THE FOURTH.

The Saving Clause in the Statute.

738i By the second section it is enacted, "that nothing Words of the in this Act shall extend to any provision for Pay- Act. ment of Debts of any grantor, settler, or devisor, or other person or persons,

"Or to any provision for raising Portions for any child or children of any grantor, settler or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise,

"Or to any direction touching the produce of Timber or Wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed."

738j It is conceived that the word interest, as used in the second of the above exceptions, refers to a free- the word in- hold interest, or at least to a long term for years, in the ter- est in the perty, the income of which is directed to be accumulated, second ex- or to an interest in the funds accumulated, considered as a ception. certain *corpus*, analogous to a corporeal hereditament; and that it does not refer to a mere right to something issuing out of or collateral to such property or accumulated funds. Indeed, if it were otherwise, the exception would open so wide a door to provisions for accumulation, as virtually to repeal the Act, the second exception of which, as Mr. Preston has observed, 'seems to have been inserted to prevent the necessity of the nobility "disposing of their landed property for the purpose of raising portions for their younger children, or the children of those for whom they were

[423] providing,"(f) in the ordinary cases (may it not be added?) where the parents themselves took interests in the land itself, as tenants for life, or in tail, or at least as termors for years determinable upon their deaths.

An annuity is not an interest within the second exception. It has been decided that an annuity payable out of the rents and profits to be accumulated, is not an interest within the meaning of the second exception in the Act. 738k

Shaw v. Rhodes, 1 M. & C. 135. A testator, after charging his estates with an annuity to his son *J. S.*, of 400*l.*; an annuity to his son *T. S.*, of 100*l.*; and an annuity to his daughter, of 100*l.*; and directing that the legatees who should become entitled to any annual payments, or to the accumulations thereafter mentioned, should not be paid by anticipation; devised the same estates, upon trust to invest and accumulate the surplus produce thereof for the benefit of his grandchildren, then born, or thereafter to be born, until the youngest should attain 21, when the accumulations were to be equally divided among such of his grandchildren as should then be living. And he directed, that in case any of his said children should be living after the youngest of his grandchildren should have attained 21, the residue of the said rents and profits should be further accumulated, and that such last mentioned accumulation should be equally divided among all his grandchildren who should be living at the death of the survivor of his said sons and daughter. And, charged as aforesaid, he directed, that immediately after the decease of the survivor of them his sons and daughter, the whole of his said estates should stand charged for 20 years with the payment of two third parts of the clear produce, in equal shares and proportions, of so much money as would in 15 years make in the whole, 30,000*l.*; and which sum, with the interest and produce thereof, he directed should be equally divided among all his grandchildren who should live to attain 21, their executors or administrators. The testator died in the year 1812, leaving ten grandchildren, of whom nine were the children of *J. S.*, and the tenth was the child of a son of the testator who died before the will was made. No grandchildren were born after the making of the will. The ten who survived the testator attained their majority; the eldest having come of age before the execution of the will, and the youngest in the year 1830. The daughter survived the two sons, and died in the year 1831. The Vice-Chancellor held, that the gift of 30,000*l.* was valid as a charge; and that the grandchildren were entitled to that sum, to be raised within 20 years from the death of the daughter, out of the two thirds of the rents and profits, by annual payments of 1500*l.*,

[424] (f) *Fearne*, 541, note (x).

to be deducted out of the rents and profits. The cause was brought by appeal before Lord Brougham, C., who was inclined to think, with the Vice-Chancellor, that it was not an accumulation prohibited by the Thelusson Act, but deemed it advisable to direct a case for a Court of Law. It being found impossible to frame a case which would fairly submit the point as a legal question; the appeal was reheard before the Lords Commissioners; and judgment was afterwards given by Lord Cottenham, C., reversing the decree of the Vice-Chancellor, in accordance with the opinion of Mr. Justice Bosanquet, one of the Lords Commissioners, who, at the Lord Chancellor's request, stated the reasons which he was prepared to give, if the case had been set down for judgment before the expiration of the Commission.

It had been argued for the respondents, that a direction to raise 30,000*l.* by a charge on the annual profits of an estate or on a fixed proportion of those profits, was not an accumulation, merely because the time of payment is postponed; each successive portion, as it from year to year accrued, instantly became a vested interest, capable of being dealt with and disposed of, although not actually receivable till the whole burden had been discharged; and that, in fact, therefore, the gift in question was no more than a deferred charge. (1*M. & C.* 148.) That, in a sense indeed, it might be said that this was a trust for accumulation, inasmuch as the very nature of every charge implies, that the growing profits of the subject charged should be laid up and appropriated to satisfy the burden; but that that was not the species of accumulation struck at in the Thelusson Act. That that act had reference solely to an accumulation such as that directed in the two preceding clauses of the present will, the effect of which is imperatively to lock up the rents of an estate, while these go on accumulating at compound interest for a long series of years, for the benefit of an individual or a class of takers who acquire no certain and vested interest in any portion of the fund until the determination of the prescribed period when the aggregate fund becomes divisible. (*Id.* 149, 150.) That, at all events, the case fell within the second exception in the Act, respecting provisions for raising portions for children of persons taking an interest under the devise. (*Id.* 150.)

Mr. Justice Bosanquet, in reply to these arguments, observed, That there were three clauses in the will bearing upon the subject. That it appeared from them, that the whole surplus rents and profits were to be accumulated: first, until the youngest grandchild should attain 21, when a division among the grandchildren then living, was to take place; and then a second accumulation was to commence, and be continued until the death of all the testator's own

children, if any of them should outlive the period at which the youngest grandchild should attain 21, when a further division among the grandchildren then living, was to be made. That both these clauses had taken effect; and the question then was, whether the third clause, which came into operation in the year 1831, on the death of his last surviving child, 19 years from the death of the testator, could be carried into effect beyond the year 1833. That no one of the three clauses was illegal on the ground of being too remote, except so far as it was affected by the Thellusson Act, since no one of them embraced a greater length of time than the period allowed for executory devises [the charges being in favour of a class of persons all of whom must necessarily be ascertained, at the latest, at the end of 21 years after the determination of three lives which were all in being at the time when the will spoke, namely, of the testator's three children, (*Ib.* 146.)] and that consequently any accumulation required to be made by the clause in question, could only be void for the excess of time beyond 21 years from the death of the testator, that is, for the excess of time from and after the 10th of July 1833, the death of the testator having occurred on the 10th of July 1812. That the

[426] preamble of the statute recited, that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof postponed, should be made subject to restrictions. That, in the principal case, the gift to the grandchildren was only to be found in the direction to divide, and they were not entitled to any division of any portion of the rents and profits *de anno in annum*, but at the expiration of 15 years, if two-thirds of the rents and profits should then have amounted to the sum of 30,000*l.*; if it fell short of that sum, they would be entitled to a further accumulation till the expiration of 20 years, for the purpose of making good the deficiency, and also (he apprehended) of paying interest on 30,000*l.* from the expiration of the 15 years to the end of 20 years. That no term was created, nor was any power given to raise the money by mortgage or sale for the time during which the estate was charged; and though, when the daughter died, the interests of the grandchildren were vested interests, yet the testator had expressed a strong disapprobation of all anticipation of benefits given by his will, and intended that the beneficial enjoyment of the annual produce should be postponed till the whole sum to be divided should be accumulated. (*Ib.* 153—157.) That he was therefore of opinion, that, according to the true construction of the third clause, an accumulation of a portion of the rents and profits was required to be made; that such portion, whatever it might be, was with-

drawn from beneficial enjoyment during the period of accumulation, and was a partial accumulation within the meaning of the statute, and consequently void, so far as that period exceeded 21 years from the death of the testator. (*Ib.* 158, 159.) That he did not think the case fell within the meaning of the second exception in the statute; for, where the whole rents and profits were given in the first place to persons during the lives of their parents, with the exception of small annuities only to be paid thereout to the parents themselves for their own lives, and a gift to the same persons, after the death of their parents, is superadded, to be paid out of the subsequent rents and profits, he could not think that the superadded gift is to be considered within the meaning of the statute, in the nature of a portion to the children of persons taking an interest under the devise. (*Ib.* 159.)

[427]

SECTION THE FIFTH.

Of the Intermediate Income accruing before the Vesting of an Executory Devise or Bequest, where such Income is not affected by the Statute of Accumulations.

739

I. WHERE there is an executory devise of real estate, and the freehold, between the death of the testator or the determination of a preceding estate, and the vesting of an executory devise, is not disposed of, the freehold and inheritance descend to the heir at law. (*g*)

The position in which the heir at law stands, and the circumstances under which alone he is excluded, are lucidly explained by Lord Brougham, in the case of *Ackers v. Phipps*, 3 Clark & Finelly, 689, before the House of Lords: "The heir at law," says His Lordship, "takes through no intention of the testator, but paramount the will, and independent of it, or, as it has been sometimes expressed and not very correctly, against the will. This is indeed quite plain: it is only saying, that he takes as heir, and not as purchaser. But, from this, it follows, that he has no occasion at all for arguments upon construction, or to ascertain intentions in his favour. The arguments belong to the party who would displace him, and by means of the intention expressed, defeat his claim; nor can he be so displaced and defeated except by direct words or plain intention—an expression which I prefer to necessary intention. There must appear to be such an intention to exclude him as to leave

I. Where

there is no disposition of the immediate freehold.

Observations of Lord Brougham on the position of the heir at law.

(*g*) *Duffield v. Duffield*, 1 Dow & Clark, 263, stated § 281; *Pay's Case*, Cro. Eliz. 878; *Clarke v. Smith*, 1 Lutw. 798; *Gore v. Gore*, 2 P. W. 28; *Hayward v. Stillington*, 1 Atk. 422; *Hopkins v. Hopkins*, Cas. temp. Talb. 44; and *Bullock v. Stones*, 2 Ves. 521; as stated, Fearn, 537—543.

[428] no reasonable doubt in the Court that it existed in the mind of the testator : and it will manifestly not be sufficient, that, from the general circumstances and situation of the party, or even from the general aspect of the instrument, we may have no moral doubt of how the framer of it would have answered the question, had he been asked to declare his meaning ; for, this is to let in every case of plain omission by mistake, and of gift by inept words, or in contravention of the rules of law. The words used in the will must be sufficient, according to their legal sense, and within the rules of law, to indicate the intention.”

II. Where there is no disposition of the intermediate income of personal estate, or only a partial disposition which is not for the benefit of the person to whom the executory bequest is made.

Glanvil v. Glanvil, 2 Meriv. 38.

III. Where the intermediate income of personal estate is partially dis-

[429] posed of for his benefit.

Harris v. Lloyd, Turn. & R. 310.

IV. Where there is a residuary devise or bequest.

II. ^a Where the intermediate income of personal estate is entirely undisposed of, or there is only a partial disposition thereof which is not for the maintenance or education of the person to whom the executory bequest is made ; the whole of the intermediate income, in the first case, and the surplus of it, in the second, will accumulate for the benefit of the person who may happen to acquire the first vested interest after the accrual of such income. (A)

A testator, after making a provision for the maintenance of his son *T. W. G.*, and of his daughter *E. G.*, gave all the residue of his real and personal estate to *T. W. G.*, to be a vested interest upon his attaining 21 ; provided, that, in case he should die before 21, then, all the residue should go to *E. G.* ; with other limitations over. Sir *W. Grant*, *M. R.*, held, that the interest of *T. W. G.* was contingent till 21 ; and therefore, that by virtue of the will, the rents and interest of the real and personal estate were to accumulate till he attained that age.

III. But where the intermediate income of personal estate is partially disposed of for the benefit of the person to whom the executory bequest is made, the rest of the intermediate income will fall into the residue : for, it is a maxim, that *expressum facit cessare tacitum*.

Thus, where a testator gave a sum of money, in trust for unborn children, and directed that until their shares should become payable, the interest should be applied in their maintenance ; Lord *Eldon*, *C.*, held, that the interest before the birth of a child, fell into the residue.

IV. And, where there is a devise or bequest of all the real or personal estate, or both, the intermediate income accruing between the death of the testator or the determination of a preceding estate, and the vesting of an executory devise or bequest, belongs to the residuary

(A) *Atkinson v. Turner*, Barnardist. Rep. Chan. 74 ; *Studdholme v. Hodgson*, 3 P. W. 300 ; and *Bullock v. Stones*, 2 Ves. Sen. 52 ; as stated, *Fearnie*, 546—7.

devisee or legatee, whether he is the same person who is entitled to the executory devise or bequest, or not. (i)

Thus, in a case where a testator devised all his real and personal estate to trustees, (with power to sell all except a certain part, and add the monies arising from such sale to his personal estate) upon a certain trust, as to a part, and as to a certain sum of money, for *G. H. A.* And as to the rest, residue, and remainder, of his personal estate, he directed it to accumulate at compound interest until *J. C. A.* should attain 24 years; then, upon trust to convey, assign &c. unto the said *J. C. A.* (upon his giving security, and executing such deeds and assurances, to the satisfaction of the said trustees, for the regular payment of the several annuities before bequeathed) all the legal estate and interest of and in all the freehold, leasehold, and copyhold lands, tenements, rents, and hereditaments, and all other the testator's real and personal estate whatsoever and wheresoever not devised and bequeathed. And the testator directed the trustees to pay a large sum annually for the maintenance and education of the said *J. C. A.* The heir at law (besides claiming the estates devised to *G. H. A.* which accrued before he attained 21, and which were not claimed by *J. C. A.*) claimed the rents of the estate devised to *J. C. A.* until he attained 24. The Vice-Chancellor held, that the words respecting the giving security and the execution of deeds and assurances by *J. C. A.* were clearly a condition precedent, and, till that was performed, his interest was contingent; and as there was no trust for the account of the rents, that the rents and profits of the residue of the real estate belonged to the heir. The House of Lords, however, decided, that the residuary gift of real and personal estate to *J. C. A.* displaced the heir, as to the rents and profits between the time of the testator's death and the attainment of the age of 24 by *J. C. A.*

Phipps v. Williams, 5 Sim. 44; S. C. nom. *Ackers v. Phipps*, 3 Clark & Fin. 667; 9 Bligh, 430.

See *Phipps v. Ackers*, 5 Sim. 704. [430]

SECTION THE SIXTH.

The Destination of the Income released from Accumulation by the Statute.

741a By the first section of the statute, it is enacted, Words of that "in every case where any accumulation shall the Act. be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so

(i) *Stephens v. Stephens*, Cas. temp. Talb. 228; *Gibson v. Lord Montfort*, and *Rogers v. Gibson*, 1 Ves. 485; *Chapman v. Blissett*, Cas. temp. Talb. 145; and *Duke of Bridgewater v. Egerton*, 2 Ves. 121—2; as stated, *Fearne*, 544—5. *Genery v. Fitzgerald*, Jac. 468.

long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Effect of this clause. It appears from several decisions upon the sub- 741b

ject, that the effect of this clause, is, to release the income from being accumulated for any longer period than that which is allowed by the Act, and to subject it to the operation of the other parts of the will, so far as they can apply in the disposition thereof; or, to the operation of the ordinary rules respecting the disposition of real property which is not disposed of by a will, or the operation of the statute of distributions, in case the other parts of the will, the trust for accumulation being removed, cannot pass such income so released from the trust for accumulation. And hence the excess of accumulation may belong, in some cases, to a person entitled to a vested particular interest; in other cases, to a residuary devisee or legatee; in other cases, to the heir at law, or the next of kin. Thus,

I. Where the trust for accumulation is engrafted on a vested interest, and the income goes to the person having such interest. I. *Where a trust for accumulation is engrafted 741c on a vested interest, so as to operate by way of exception out of such vested interest, the excess of accumulation will belong to the person entitled to such vested interest. (*) For, the income being released from the trust for accumulation, constitutes an incident to such vested interest, as it would if no accumulation had been directed.

II. But where the income of a particular legacy or portion of property, is to be accumulated prior to the vesting of such legacy or portion of property, the income accruing beyond the period allowed by the statute for accumulation, upon or from such legacy or portion of property, and upon or from the accumulation made within the period allowed by the statute, goes to the residuary devisee or legatee, if there is a residuary devise or bequest, or to the heir at law, in the case of real estate, or the next of kin, in the case of personal estate, if there is no residuary devise or bequest. 741d

Grounds of the rule. For, it cannot be considered that the persons to whom the contingent devise or bequest is made, would have been entitled to the income if an accumulation had not been expressly or impliedly directed or authorised: for, as their interest is only contingent, they could have no right to the intermediate income, prior to the vesting of such interest; and, as it is uncertain whether that interest will ever vest, it cannot be said, with any degree of truth, that they would even eventually have been entitled to the intermediate income, if an accumulation had not been expressly or impliedly direct-

(*) See *Trickey v. Trickey*, 3 M. & K. 560.

ed or authorised. And hence the income accruing beyond the period allowed, is held to belong to the residuary devisee or legatee.

A testatrix gave 8000*l.* in trust to accumulate until *2. Crawley v.* should attain 25; and when he should have attained that *Crawley, 7* age, in trust to transfer the 8000*l.* and the accumulations *Sim. 427.* thereof, to him. Sir L. Shadwell, V. C., held, that the trust *See also* was good for 21 years after the testatrix's death, but was *O'Neill v.* void for the excess beyond that period, and that the accum- *Lucas, 2* ulation beyond that period would fall into the residue, and *Keen, 313.*

form part of the capital thereof.

741. III. Where the income of residuary property is III. Where to be accumulated prior to the vesting indefeasibly it goes to the of such residuary property; the income accruing beyond the heir or next period allowed by the statute for accumulation, upon or of kin. from such residuary property, and upon or from the accumulations made within the period allowed by the statute, goes to the heir at law, in the case of real estate, or to the next of kin, in the case of personal estate.

In this case, the income to be accumulated could not go *Grounds of* to the residuary devisees or legatees. It could not be allow- *the rule.* ed to form part of the capital of the residue; because that would be contrary to the statute, the income to be accumulated, in the supposed case, being that of residuary property. Nor could it form part of the income of the residuary property; because that would have been contrary to the other parts of the will: for, that would have been giving the residuary devisees or legatees an immediate enjoyment, though the will had given them only a contingent right, or, at most, only a present but defeasible right of future enjoyment.

A testator gave the residue of his property to *R. S.*, eldest *McDonald* son of *P. S.*, on his coming of age: failing him, to the next *v. Brice, 2* male child of *P. S.* who should attain 21; failing the male *Keen, 276.* children of *P. S.*, to certain other legatees. *R. S.* survived the testator, and died an infant; and *P. S.*, who was far advanced in years, had no other son. The period expired, which the statute allowed for the accumulation which resulted from the suspension of the vesting of the limitation to the first son who should attain 21, or of the alternative limitation to the other legatees. And Lord Langdale, M. R., held, that the dividends to accrue, till the determination of the contingency upon which the residue was given, on the residue and its lawful accumulations, belonged to the next of kin, and not to the residuary legatees.

[433]

In another case, a testator gave certain annuities out of *Eyre v.* his residuary estate, to his three children; and requested *Marsden, 2* that the surplus of the annual income might be applied in *Keen, 564.* accumulation of the capital of his property, for the benefit of his grandchildren, and which was to be divided among

them after the death of the survivor of his three children. And the will contained clauses substituting the issue of grandchildren dying leaving children for such grandchildren; and carrying over to the survivors the shares of such as should die without children. Thirty years elapsed between the death of the testator and the death of the survivor of his children. Lord Langdale, M. R., held, that as two of the grandchildren were not the children of any person taking an interest under the will, and as the accumulation seemed to be a provision, not for raising portions, but for making additions to the capital for the purpose of making one gift of an aggregate fund, the case was not within the exception of the Act. And his Lordship also held, that the accumulations beyond 21 years from the testator's death, arising from the personal estate, belonged to the next of kin, and not to the residuary legatees, and that those arising from the real estate, belonged to the heir at law. "Nothing," observed His Lordship, "is to be paid to the grandchildren until the death of the surviving child, and in the meantime the interests of the grandchildren may be divested, and become vested in other persons; and to direct that payments shall be made at the end of 21 years, before the death of the testator's surviving child, would be to direct that which the testator has not directed, and to give and defeat interests directly contrary to his meaning and intention."

CHAPTER THE SIXTH.

I. Division of executory interests with reference to the capacity of transmission existing at the time of their limitation.

OF THE TRANSMISSION OF EXECUTORY INTERESTS.

- I. LOOKING to the capacity of transmission, in case of death before the contingency happens, as such capacity exists at the time of their limitation, 1. Some executory interests are transmissible in all events. 2. Others are untransmissible. 3. Others are transmissible in some events only. 742
1. Executory interests in real property, which are not contingent on account of the person (§ 94), descend to the heir of the persons to whom they are limited, and such executory interests in personal property, pass to the executor or administrator(*a*) of the persons to whom 743
1. Transmissible in all events.

(a) *Pinbury v. Elkin*, 1 P. Wms. 563; *Barnes v. Allen*, 1 Bro. C. C. by Belt; and *Stanley v. Wise*, 1 Cox, 432; as stated, 1 Rep. Leg. 513, 514.

they are limited, where they die before the contingency happens on which such interests are to vest.

744 2. Those executory interests which are contingent simply on account of the person, are of necessity untransmissible executory interests: because, if there should be no person answering the given description, of course no interest ever attaches in any one. And if there should be such a person, the interest limited to him becomes a vested interest in him; so that, on his death, it is transmitted to his representative, not as an executory interest, which it has ceased to be, but as a vested interest.

745 3. Those executory interests which are executory both on account of the person and also by reason of being made to depend on some other contingency which does not concern the person, are transmissible in some events only. For, if there should be any person answering the given description, and yet the other contingency does not happen during their lifetime; the interests having attached in a person existing and ascertained, and yet still remaining executory on account of the suspense of the other contingency, are, in such case, and not otherwise, transmissible as executory interests: But,

746 II. Looking to the capacity of transmission, as it exists at the death of the persons to whom executory interests are limited, such interests must of course at that moment be either, 1. Transmissible. 2. Untransmissible. Thus,

747 1. Where the executory interest was not in the first instance contingent on account of the person, (b) or where it ceases to be contingent on account of the person; the interest is transmissible, though of course, in the latter case, unless it continues executory on account of some other contingency on which it depends, it is then transmissible as a vested and not as an executory interest.

748 2. Of course, if there never happens to be a person answering the given description, whether he is directly or indirectly required to be living at a certain time, (c) or whatever else the qualification directly or indirectly may be, the executory interest never attaches in any one, and therefore it can never be transmitted, but fails altogether.

749 3. Transmissible in some events only. For, if there should be any person answering the given description, and yet the other contingency does not happen during their lifetime; the interests having attached in a person existing and ascertained, and yet still remaining executory on account of the suspense of the other contingency, are, in such case, and not otherwise, transmissible as executory interests: But,

750 II. Looking to the capacity of transmission, as it exists at the death of the persons to whom executory interests are limited, such interests must of course at that moment be either, 1. Transmissible. 2. Untransmissible. Thus,

(b) *Wood's Case*, 1 Rep. 99a, as stated, *Fearne*, 364. *Pinbury v. Elkin*, 1 P. W. 563; *King v. Withers*, Cas. temp. Talb. 117; *Gurnel v. Wood*, 8 Vin. p. 112, ca. 38; *Chauncy v. Graydon*, 2 Atk. 616; *Peck v. Parrot*, 1 Ves. Sen. 236; and *Goodright v. Searle*, 2 Wils. 29; as stated, *Fearne*, 556—561. (c) *Moorhouse v. Wainhouse*, 1 Black. Rep. 638, as stated, *Fearne*, 365.

CHAPTER THE SEVENTH

OF THE ALIENATION OF EXECUTORY INTERESTS.

- I. By assign- I. * EXECUTORY interests, in persons in being and 749
ment in equity. ascertained, are assignable in equity, for valuable consideration; and they are assignable, even for good consideration, except as against *bond fide* creditors. (a)
See § 71. ^b And it would also seem that executory interests 750
in favour of persons who do not yet answer a given description, can be assigned in equity, before such persons answer such description. (b) For, ^c there are cases where even a mere hope or expectancy has been assigned in equity. (c) When it is said that executory interests are assignable in equity, ^d it is meant, that an assignment of them is treated by a Court of Equity as a contract or agreement of which it will decree a specific performance. (d)
- II. By re- II. * EXECUTORY interests in real estate are re- 751
lease. leaseable to the terre-tenant or owner of the land, but not to a stranger. (e)
- III. By de- III. * EXECUTORY interests, even before the sta- 752
vise before tute 1 Vict. c. 26, might be disposed of by the will of any person to whose representative the property would have passed, had he died immediately before the making of the will. (f)
- [437]
Vict. c. 26. And, by that statute, (s. 3) it is enacted, that "it 753
By devise under stat. shall be lawful for every person to devise, bequeath
1 Vict. c. 26, or dispose of, by his will executed, &c., all real and personal
s. 3. estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to . . . all contingent, executory, or other future interests in any real

(a) See Fearné, 549; and *Wright v. Wright*, 1 Ves. Sen. 409, as stated, Fearné, 550.

(b) See Fearné, 549; and *Higden v. Williamson*, 3 P. W. 132, as stated, Fearné, 549. But see *Pope v. Whitcombe*, 3 Russ. 124.

(c) *Beckley v. Newland*, 2 P. W. 182, 187; and *Hobson v. Trevor*, 2 P. W. 191; as cited, Fearné, 550—1.

(d) See Fearné, 551.

(e) 2 Pres. Abstr. 284.

(f) *Moor et Uz. v. Hawkins*, cited 1 H. Blac. Rep. Com. Pl. 33, 34, as stated, Fearné, 369. And see Fearné, 371.

or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will."

754 IV. "Executory interests may be bound by IV: By es-
estoppel, even though merely created by an inden- toppe! and
ture; (g) but "they cannot be transferred by deed. Nor, conveyance,
deed, can an executory interest, whilst it continues such, be
directly, though it may be indirectly, transferred by a fine or
recovery. (h)

755 If a fine was levied of an executory interest, or
of a mere expectancy of an heir apparent, it ope- See § 71.
rated at first by estoppel only: it did not actually transfer
the interest or expectancy; nor had it any other present
effect than that of indirectly binding the interest or expect-
ancy, so as to preserve it for the cognizee by estopping or
preventing the cognizor and those claiming under him from
contradicting what he had done, by any attempt to dispose
of or affect it in any other way. But, as soon as the inter-
est or expectancy became a vested interest in the cognizor,
the fine operated as a conveyance to the cognizee, in the
same manner as it would have operated in the first instance,
if the interest had been a vested interest, and therefore
capable of being transferred. And thus the estoppel vir-
tually and finally amounted to, though it was not, in the
first instance, an actual transfer of the executory interest or
expectancy.

756 And so an executory interest might be indi-
rectly transferred by a common recovery wherein
the person entitled to such executory interest came in as
vouchee. (i)

756*. A testator devised an estate to his wife, for life; *Doe d.*
remainder to all and every the children of *R. E. Brune v.*
and *M. P.* who should be living at the time of his wife's *Martyn*, 8
death. Two of these children levied a fine *sur con. de droit* *Bar. & Cres.*
some two &c., of their shares, during the life of the wife. 527.
Bayley, J., in delivering the judgment of the Court, said,
"That a fine by a contingent remainder-man passes nothing,
but leaves the right as it found it; that it is therefore no bar
when the contingency happens, in the mouth of a stranger
to that fine, against a claim in the name of such remainder-
man; that it operates by estoppel, and by estoppel only;
and that parties or privies may avail themselves of that
estoppel, but parties and privies only." A stranger cannot,

(g) 4 Jarm. Conv. 124.

(h) 2 Prea. Abstr. 118; 2 Pres. Shep. T. 238; Fearn, 365—6, 551—2.

(i) Fearn, 366.

because he is not estopped himself, and estoppel must be reciprocal. (8 B. & C. 524—527.)

Doe d. Christmas v. Oliver, 19 Bar. & Cres. 187, 190. See also *Weale v. Lower*, Pollex, 54, as stated, Fearn, 365. In another case, testator devised lands to his wife, for life; remainder to all the children of his brother that should be living at her decease. His brother left one daughter, who married, and afterwards, with her husband, levied a fine *come ceo* in the lifetime of the testator's widow. Bayley, J., delivered the judgment of the Court; and, after advert- ing to the case of *Doe d. Brune v. Martyn*, said, that, in that case, "the operation of the fine by estoppel was suffi- cient for the purpose of that decision: whether it operated by estoppel only, or whether it had a further operation, was quite immaterial in that case:" but that, in the principal case, it was necessary to investigate that point; and that the Court was of opinion, that the fine, in that case, "had a double operation; that it bound the conusors by estoppel or conclusion, so long as the contingency continued; but that when the contingency happened, the estate which devolved upon the testator's daughter fed the estoppel; the estate created by the fine by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave the party claiming by virtue of the fine, and those having right under him, exactly what he would have had, had the contingency happened before the fine was levied."

[439]

CHAPTER THE EIGHTH.

[440]

OF THE SUPPORT OF CONTINGENT REMAINDERS.

Contingent remainder for years does not require a preceding freehold to support it; (a) for, though it is a remainder, in a lax sense, as regards the pos- session, it is not a remainder, strictly so called, as regards the seisin, property, or ownership. (See § 46—7, 50, 58, 159.) 756a

But a con- tinent free- hold remain- der must be supported by a preceding freehold. ^b A contingent remainder of the measure of free- hold, unless the legal estate is in trustees, must be supported by a previous vested freehold estate; (b) that is, it must be originally preceded by a vested interest, of the measure of freehold, which is capable, in its original limita- tion, of enduring till the vesting of the remainder; otherwise it is void *ab initio*: and one such previous estate of freehold 757

(a) Fearn, 285.
(b) Fearn, 281, 284. *Goodright v. Cornish*, 1 Salk. 226; and *Scatterwood v. Edge*, 1 Salk. 229; as stated, Fearn, 282. *Davies v. Speed*, as stated, Fearn, 284.

must actually endure until that period; otherwise the remainder will subsequently fail.

In elucidation of this proposition, let us consider separately each of the rules embodied therein.

758 I. A contingent remainder of the measure of freehold must be originally preceded by a vested interest of the measure of freehold; otherwise it will be void *ab initio*.

I. A contingent remainder of the measure of freehold

must be originally preceded by a vested freehold.

759 A freehold interest, whether vested or contingent, unpreceded by any other interest, or by any other than a contingent or a chattel interest, cannot be termed a freehold remainder, as regards the seisin, property, or ownership, any more than the portion first severed or taken from any *corpus*, can be termed a remainder or remnant thereof.

A freehold interest not so preceded cannot be a remainder.

760 Thus, 1. Where a vested interest of the measure of freehold is limited after a term for years; although the limitation is good, yet the interest so limited is not an interest in remainder, but a present interest, so far as regards the seisin, property, or ownership, subject only, as regards the possession, to a previous chattel interest. (See § 159, 111e, 46—7, 50, 58, 245—257.)

[441]
1. A vested freehold interest after a term for years, is not a remainder.

761 2. And where a contingent interest of the measure of freehold is limited by deed at common law, to take effect as a remainder after a chattel interest; as where lands are granted to A. for 21 years, with remainder to a person unborn; the limitation is void: (c) because, of course, it is no more a remainder, as regards the seisin, than a vested interest after a term for years, is a remainder; and the interest, being contingent, cannot take effect as a present interest; so that it necessarily fails.

2. A contingent freehold interest limited after a chattel interest at common law, is not a remainder, and is void.

762 For, it is a rule, that the freehold shall never be in abeyance; and as the contingent freehold remainder cannot take effect as a present interest, the freehold must reside, as a present interest, in some other person than the contingent remainder man; and, whether it resides in the grantor or his heir at law, or in the heir at law of the deviser, or in an ulterior vested remainder-man, as a present interest, the contingent interest limited after the chattel, necessarily fails; because, if it were allowed to take effect on the happening of the event on which its vesting is suspended, it could only take effect in defeasance or suspension of the present interest so residing as aforesaid in the other person, instead of taking effect after a term, unpreceded by, and not affecting, any other freehold interest. It could not take effect, therefore, in the way intended; and the other

See § 59.

mode of taking effect, in defeasance or suspension of another
See § 148-9, interest, was a mode which was foreign to the simplicity of
149a. the common law.

3. And though a contingent interest of freehold 762a
duration limited after a chattel interest may be
[442] good, if limited by way of use or devise; yet it is not good
interest limited as a remainder, but as a springing interest. (See § 159,
ted after a 117—127a.)
chattel interest, by way of use or devise, is good, but not as a remainder.

4. A freehold 4. Again; where a freehold interest, limited by 763
interest limited by way of use or devise, is only preceded by a con-
ted by way of contingent interest of freehold duration, though it may be good,
of use or devise and though it may be termed a remainder in relation to such
after a preceding contingent interest, and it has the capacity of be-
contingent coming a remainder, in every respect; yet, so long as it is
interest only, only preceded by a contingent interest, it cannot be a remain-
is good, but der in the strict sense of the term; it cannot be a remaining
not as a re- portion of the seisin, property, or ownership, any more than
mainder. if it were not preceded by any freehold interest at all. (See
§ 46—7, 50, 159, 677.)

5. A freehold 5. Where a freehold interest, at common law, is 763a
interest limited preceded by a contingent interest of the mea-
ted after a sure of freehold, it is void. For, as already observed, it is a
contingent rule that the freehold shall never be in abeyance; and as
interest only, the ulterior freehold interest was intended to be a future
at common interest, the present freehold must reside in some person
law, is not other than the person entitled to the ulterior freehold interest,
a remainder, and of course it must reside in some other individual than
and is void. the person entitled to the preceding contingent interest; and
hence it must reside in the grantor or his heir at law; and
consequently the ulterior freehold interest fails, for the same
See § 762. reasons as those above assigned for the failure of a con-
tingent freehold interest limited by deed at common law
after a term.

II. A contingent remainder is void *ab initio*, 764
not only unless it is preceded by a vested freehold
remainder must interest of some kind, but also unless it is preceded by a
continue freehold interest which may, by its original limitation, en-
to be preceded dure until the vesting of the remainder: and it will subse-
by a vested quently become void, unless one such freehold interest
freehold eventually endures until that period.

If there is any intervening undisposed of portion 765
of seisin, property, or ownership, between the de-
termination of a prior interest, and the commencement, that
is, the vesting in right, of a subsequent contingent interest,
[443] such subsequent interest cannot take effect as a remainder;
mainder. because, when the period of the determination of the prior
interest arrives, the subsequent contingent interest fails, for

the same reasons as those already given for the failure of a contingent interest which is limited to take effect as a remainder after a chattel, and is unpreceded, in its original limitation, by any freehold. See § 762.

765a If the remainder is all along preceded by such a preceding estate, it is sufficient, though the first preceding estate may have become forfeited or determined before the vesting of the remainder. (d) But not necessarily by the first preceding estate.

765b III. It is not necessary that there should be a preceding estate which is vested in possession: it is sufficient if there is such a preceding estate of freehold duration as is vested in interest, so that it would under the old law confer, at the time when the remainder should vest, a present right of entry. (e) III. Not necessary that the preceding estate should be vested in possession.—See § 79-81.

765c IV. "Where the legal estate is devised to and vested in trustees in trust, there is no need of any preceding particular estate of freehold to support contingent limitations: for, the legal estate in the general trustees will be sufficient for that purpose. (f) IV. A preceding estate is not necessary, where the legal estate is in trustees. See § 783.

CHAPTER THE NINTH.

[444]

OF THE DESTRUCTION OF CONTINGENT REMAINDERS AND OTHER EXECUTORY INTERESTS.

SECTION THE FIRST.

The Destruction of Contingent Remainders created out of a Legal Fee Simple in Freehold Hereditaments.

766 It will appear, from the foregoing chapter, that whenever the legal estate is not in trustees, and there is, in the first instance, or there happens to be, eventually, but one preceding estate of freehold duration, and that estate is determined, so as not even to exist as a right sole subsist- A contingent remainder is destroyed by the determination of the preceding estate of freehold duration, and nation of the

(d) *Corbet v. Tichborn*, 2 Salk. 576, and *Lynch v. Cook*, 2 Salk. 469, as stated, Fearn, 283. But see *Sir Thomas Palmer's Case*, Moor, 815, as stated, Fearn, 282.

(e) See Fearn, 286—301, and Butler's Notes thereto.

(f) Fearn, 303; and *Chapman v. Blisset*, and *Hopkins v. Hopkins*, Cas. temp. Talb. 145, 44, as stated Fearn, 304—5.

ing preceding estate, before such remainder vests. * And it will never afterwards arise, even though the particular estate be subsequently restored.(a)

This determination may happen in various ways. Now, the preceding estate may be determined, 767 so as to cause the destruction of a contingent remainder limited thereon, whether at common law or otherwise, in various ways. Thus,

I. Where the sole subsisting preceding estate happens to expire, according to its original limitation, before the contingency occurs, upon which the remainder is to take effect: as, where an estate is given to *A.* for life, remainder to the right heirs of *J. S.*, and *A.* dies in the lifetime of *J. S.*, and consequently before there can be any heir of *J. S.* 768

See § 383.

[445] II. Where the tenant of the preceding estate was disseised, and his right of entry tolled.(b) 769

II. By disseisin and tolling of the right of entry. III. Where the preceding legal estate is destroyed, and a new estate created, by the tenant of such preceding estate, by the operation of a tortious assurance, as a * feoffment, fine,(c) or * recovery.(d) 770

And, as regards the operation of the assurance, it is the same whether the tenant of such preceding estate is beneficially entitled, or is only a trustee. 771

Before the statute of uses, indeed, "if feoffees in trust had aliened without consideration or with notice, the lands would have been subject to the old uses; but that was because the feoffees themselves, before that statute, stood seised of the legal fee simple; and of course their alienee came in, either of the same estate, or of an estate derived out of that. But since the statute it is otherwise; for now the feoffees are seised of no greater estate than what is actually limited in use to them, the seisin being executed to the uses by the statute: from whence it follows, that when the feoffees do not take the use in fee, if they make a feoffment, their feoffees come in, neither of, nor under, the estate of which they were seised, but of a new estate acquired by disseisin."(e) 772

III. By the destructive operation of a feoffment, fine, or recovery, by the tenant of the preceding estate, whether he is beneficially entitled, or not. 773

(a) *Fearne*, 315, 349. An alteration merely in the quality, and not in the quantity, of the particular estate, will not destroy a contingent remainder. *Fearne*, 338, and cases there cited.

(b) See *Fearne*, 286, note (c).

(c) *Archer's Case*, 1 Rep. 66; and Co. Litt. 290 b. (1) IV. & V. 4.

(d) *Denn d. Webb v. Puckey*, 5 D. & E. 299, stated § 570. *Driver d. Edgar v. Edgar*, Cowp. Rep. 379; and *Fountain v. Gooch*; as stated and commented on, *Fearne*, 426—428.

(e) *Fearne*, 325. And *Chudleigh's Case*, 1 Co. Rep. 120, as stated, *Fearne*, 324.

774 The student must be careful to observe, that it is the destruction of the particular estate by a tortious assurance which destroys contingent remainders, and not the mere transfer thereof by an innocent assurance. For, 'if a tenant for life separately bargains and sells, or if he leased and released, to a stranger in fee; these are innocent conveyances, which pass no more than what lawfully may pass, and cannot effect the estate for life in any other way, than by transferring it to another person. (f)

776 IV. Where the tenant for life does some act which amounts to a forfeiture; such as the acceptance of a fine *come ceo*, &c., from a stranger, and there is no right of entry in any other person, except a subsequent vested remainder-man, and such remainder-man takes advantage of the forfeiture; the intermediate contingent remainders are destroyed. (g)

777 V. Where the particular estate merges in the inheritance in fee or in tail, either by the act of the particular tenant, or by the descent of the inheritance on the particular tenant subsequently to the taking effect of the particular estate.

778 I. This merger may be occasioned by the act of the particular tenant, in various ways—

(1) ^a If the tenant for life accepts the reversion in fee before the vesting of the contingent remainders. (h)

(2) ^a If the tenant for life surrenders, ⁽ⁱ⁾ bargains and sells, or leased and released, ^(k) to the immediate vested remainder-man in tail or in fee, or to the reversioner.

(3) ^a If the tenant for life and the immediate remainder-man or reversioner join in a conveyance. (l)

(4) ^a If a tenant for life, having also the immediate vested remainder or reversion, bargains and sells, or leased and released. (m)

779 2. ^a The merger of the particular estate, and the destruction of contingent remainders thereby, may be occasioned by the descent of the inheritance on the particular tenant subsequently to the taking effect of the particular estate.

In this case, the descent of the inheritance may be allowed its full operation of merger, without rendering the limitations originally and totally abortive; for, the particular estate

(f.) Compare Fearn, 322, with Butler's note (f), 322.

(g.) See Fearn, 323, and *Lloyd v. Brooking*, 1 Vent. 188, as there stated.

(h.) *Purefoy v. Rogers*, 2 Saund. 380, as stated, Fearn, 317.

(i.) *Thompson v. Leach*, 2 Vent. 198, as stated, Fearn, 318.

(k.) Fearn, 321, note (f).

(l.) Fearn, 321, note (f), and 340.

(m.) Fearn, 321, note (f).

the taking effect of the particular estate.

having once taken effect before the descent of the inheritance happened, there is no more reason that it should be exempt from the accidental operation of merger in this case, than in any other case where the inheritance becomes united with the particular estate.(n)

3. But not by the descent of the inheritance on the particular tenant at the moment of the taking effect of the particular estate,

3. But, * where a testator limits a particular estate to the heir, with a contingent remainder over without any ulterior vested remainder carrying the fee, so that the inheritance descends to the heir till the contingency happens, at the very time when his particular estate first takes effect; the inheritance is not executed in him perfectly, so as to merge the particular estate, but only *sub modo*, so as to leave an opening for the interposition of the remainder, when the contingency happens. 780

For, in this case, as the descent takes place at the very time when the particular estate takes effect, namely, at the death of the testator; if merger were to take place, the particular estate would arise, and be destroyed, in one and the same instant, and would be destroyed by a descent permitted by the very same will by which it was created.(o)

4. Nor by the union of the particular estate and the inheritance under the conveyance by [448] which, and at the time when, both were created.

4. * And, in like manner, where, by the same conveyance a particular estate is first limited to a person, with a contingent remainder over to another, with such a reversion or remainder to the first person, as would, in its own nature, drown the particular estate first given him; the last limitation is construed as executed *sub modo* only, in order that the arrangement of the settlor may be carried into effect, instead of being defeated in its birth.(p) 780a

Trust estates to preserve contingent remainders. Mere right of entry in the trustees is sufficient.

The liability of contingent remainders to destruction in these ways, occasioned the introduction of trust estates to preserve them.(q) 781

And * it has been decided, that if a fine determines the particular estate, the right of entry in the trustees to preserve contingent remainders, supports them, without an actual entry.(r) 782

(n) See *Fearne*, 343—345; and *Kent v. Harpool*, T. Jones, 76; and *Hooker v. Hooker*, Rep. temp. Hard. 13; as stated, *Fearne*, 342.

(o) See *Fearne's* observations, 343—345; and *Plunket v. Holmes*, 1 Lev. 11; *Boothby v. Vernon*, 9 Mod. 147; and *Archer's Case*, 1 Rep. 66; as cited, *Fearne*, 341, 342.

(p) *Fearne*, 346.

(q) *Fearne*, 326. Little else remained to be done in regard to the subject of this chapter, than to express or arrange the points in the corresponding chapter in *Fearne*; in a somewhat more perspicuous manner. And as to the nature of trust estates to preserve contingent remainders, and the jurisdiction of a Court of Equity for the purpose of transposing and supplying them, and of punishing the trustees for joining, or ordering them to join, in destroying contingent remainders; it is only necessary to refer to *Fearne*, 326—338.

(r) *Davies v. Bush*, M'Clel. & You. 88.

SECTION THE SECOND.

The Destruction of Contingent Remainders created out of an Equitable Fee Simple Estate in Freehold Hereditaments, or an Equitable Subordinate Fee Simple in Copyholds.

783 *THERE is no necessity for the continuance of a No necessity preceding particular estate of freehold to preserve for the con-
contingent remainders, where the legal estate in fee is vested tinuance of a
in trustees: for, the legal estate of the trustees, will be suffi- particular
cient to preserve the contingent remainders, notwithstanding estate, where
the regular expiration of the particular estate, before the legal es-
contingent remainder can vest.(s) tate is in
trustees.

In *Roe d. Clemett v. Briggs*, the Lord Chief Justice ob-
served, that where a contingent remainder is created out of Observations
a common fee simple estate, it must have a previous estate [449]
of freehold to support it; and the destruction of every such of Lord El-
previous estate before the remainder vests, destroys the re- lenborough
mainder: but where the remainder is created out of what as to this
may be called a subordinate fee simple estate, as out of a point.
copyhold, where the ordinary fee simple is in the lord; or
out of an equitable fee simple, where the ordinary legal fee
simple is in some other person; the destruction of the pre-
vious estate will not affect the remainder, but it shall be
supported by the ordinary fee simple estate.(t)

And where a testator devised freehold and copyhold sur- *Habergham*
rendered to the use of his will, to trustees and the survivor *v. Vincent*,
and his heirs, in trust to pay debts and legacies, &c.: then, *2-Ves. 204.*
on the marriage of *B. N. H.*, to convey to her and to her
children in tail, as therein mentioned, remainder to such
persons, &c., as he should, by any deed or instrument attest-
ed by two witnesses, appoint. The next day, by deed poll
attested by two witnesses, and reciting the will, he directed
his trustees, immediately after the death of *B. N. H.*, and
failure of her issue, to convey all his real estate to the chil-
dren of his son in tail, as therein mentioned; then, to the
right heirs of the survivor of his trustees, his heirs and as-
signs, for ever. No conveyance was made. *B. N. H.* and
the son died without issue, leaving one trustee surviving.
Lord Loughborough, C., and *Wilson, J.* and *Buller, J.* held,
that the deed was to be considered as a codicil sufficient to
pass the copyholds; and that the last limitation was a con-
tingent equitable remainder to the heir of the surviving

(s) See *Chapman v. Blissett*, Cas. temp. Talbot, 145; and *Hopkins v. Hop-*
kins, *ib.*, as stated, *Fearne*, 304, as to freehold.

(t) *Lord Ellenborough, C. J.*, in *Roe d. Clemett v. Briggs*, 16 East, 413, in
accordance with *Lord Kenyon's* observations in *Doe v. Martin*, 4 D. & E. 64.

trustee, and was supported by the legal estate which the trustees took under the will. The Court, however, were agreed that if the remainder had been of the legal estate, it would have been void; Mr. Justice Buller observing, that *Lane v. Pannel* showed that; (2 Ves. 233) and the Lord Chancellor remarking, that the only distinction between freehold and copyhold was, that the estate of the lord will preserve contingent remainders against a forfeiture. (1b. 209.)

[450]

Cestui que trust for life cannot destroy a contingent remainder; But cestui que trust in tail may.

"*A cestui que trust* for life cannot, by feoffment or other conveyance, destroy a contingent remainder; for, since he has not the legal estate in him, whatever conveyance he may make, passes only what he can lawfully grant, that is, his trust estate for life, and there is a right of entry residing in the trustees (u) though, a *recovery by a tenant in tail of a trust estate, is allowed to bar the remainder, because he is master of the estate, and may call in the legal estate whenever he pleases. (x)

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785

SECTION THE THIRD.

The Destruction of Contingent Remainders created out of a Legal Fee Simple in Copyholds.

I. Where the preceding estate expires by original limitation, the remainder is destroyed.

I. It would seem, that in the case of copyholds, where the preceding estate expires, by original limitation, or would have expired, by original limitation, before the vesting of a contingent remainder; such remainders are destroyed: (y) because, although the ordinary freehold is in the lord, and that is capable, in itself, of supporting a contingent remainder, yet, if such estate were construed to support the remainders, they would be enabled to take effect in a different way from that provided by their original limitation; whereas, the settlor or deviser may possibly have intended that they should fail, if they could not take effect in the way contemplated by the limitation.

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II. But where the

II. But where the preceding estate is determined by the act of the tenant, as *by surrender to the

787

(u) Fearn, 321.

(x) Fearn, 321; and *Doe d. Cadogan v. Ewart*, 7 Ad. & El. 636; stated § 568.

(y) See Fearn, 320. And see *Habergham v. Vincent*, 2 Ves. 233, stated § 783.

lord(z) or "to another person,(a) or "acceptance of the preceding reversion,(b) or "forfeiture,(c) and would not have expired, estate is destroyed by original limitation, before the vesting of the contingent remainder, such remainder is supported by the ordinary act of the freehold in the lord : because, the settlor or deviser cannot tenant, the be supposed to have contemplated their destruction by the remainder is act of the tenant of the preceding estate, or, at all events, not destroyed, must have intended that they should be supported and take effect notwithstanding any such act.

788 III. "If, however, the freehold of inheritance in III. Remain- the lord of a manor, becomes united with a particular destroy- ticular estate of copyhold, by a deed of enfranchisement, ed by enfran- the contingent remainders expectant upon such particular chisement. estate, are thereby destroyed.(d)

SECTION THE FOURTH.

The Destruction of Contingent Remainders created out of Estates pur autre vie.

788a "WHERE estates *pur autre vie* are limited to one in tail, [or rather, for an estate in the nature of an estate tail,] he may, by any conveyance proper for passing estates of freehold, bar his own issue and all remainders over, and make a complete disposition of the whole estate."(e) "For though the original lease be only for three lives, yet it being the interest of both landlord and tenant that the leases should be renewed, and it being the doctrine of the Court of Chancery, that all such new leases are subject to the old trusts, the estate might by this means continue for ever, without the possibility of being barred."(f)

"But an estate *pur autre vie* may be limited to one for life, so as to confine his interest and power of disposition to his own life estate only."(g)

(z) *Pawsey v. Lowdall*, 2 Roll. Abr. 794, pl. 6, as stated, Fearn, 319.

(a) *Lane v. Pannel*, 1 Roll. Rep. 238, 317, 438, as cited, Fearn, 319.

(b) *Mildmay v. Hungerford*, 2 Vern. 243, as stated, Fearn, 320.

(c) Fearn, 320. See also *Habergham v. Vincent*, 2 Ves. 209; stated § 783.

(d) *Roe d. Clemett v. Briggs*, 16 East, 406.

(e) Fearn, 499. See also, *Ib.* 496; and *Mogg v. Mogg*, 1 Meriv. 654, stated § 705. *Duke of Grafton v. Hanmer*, 1 P. W. 266, in the note; *Baker v. Bayley*, 2 Vern. 225; *Norton v. Frecker*, 1 Atk. 524; and *Saltern v. Saltern*, 2 Atk. 376; as stated, Fearn, 497—499.

(f) Reporter's observations on *Duke of Grafton v. Hanmer*, 3 P. W. 226, in note, as cited, Fearn, 497.

(g) Fearn, 499.

SECTION THE FIFTH,

The Destruction of Executory Interests not limited by way of Remainder.

By recovery.	THESE ¹ executory interests, if engrafted on an estate tail, might be destroyed by the tenant in tail, by means of a common recovery. (h)	789
Not by mere alteration in estate.	But ¹ such interests cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which they are limited. (i)	790

(h) Fearn, 424; and *Page v. Hayward*, 2 Salk. 576, as there stated.

(i) Fearn, 418, 421; and *Lee v. Lee*, Moor, 268, as stated, Fearn, 422.

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